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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2006

DAVID A. SCHOLL,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a United States Court of Appeals grant a writ of mandamus directing a lower court to dismiss an action under Rule 12(b), Rules of Court of Federal Claims, where:

(a) the lower court carefully considered its jurisdiction and whether a claim had been stated and its affirmative answers were not so plainly wrong as to indicate failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine; and,

(b) the assertion of imminent harm was discovery with respect to the decision of a court of appeals not to reappoint a bankruptcy judge?

2. Should a regional court of appeals be treated with exceptional deference when making an employment decision so as to deprive an employee of procedural rights under the Constitution and rules of court, and procedural and substantive rights under the regulation governing his reappointment?

PARTIES TO THE PROCEEDINGS

Petitioner is plaintiff David A. Scholl, former bankruptcy judge in the US District Court for the Eastern District of Pennsylvania.

Respondent is the United States.

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Statement under Rule 29.6:

None of the parties to these proceedings is a corporation.

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PRELIMINARY STATEMENT

Petitioner David A. Scholl hereby petitions the court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit entered September 11, 2006, granting the government's petition for mandamus and directing the US Court of Federal Claims to dismiss the complaint.

OPINIONS BELOW

Decision of the court of appeals is reported at 463 F.3d 1328 (Fed. Cir. 2006) [A2]. The order denying rehearing is reported at 2006 US App. Lexis 32259 [A1].

Opinions of the US Court of Federal Claims are reported at 54 Fed.Cl. 640 (2002) [A-59], 61 Fed.Cl. 322 (2004) [A-48], 68 Fed.Cl. 58 (2005) [A-37], and 69 Fed.Cl. 395 (2005) [A-25].

JURISDICTION

This court has jurisdiction over this case under 28 USC § 1254(1), because it involves review of a judgment of the US Court of Appeals for the Federal Circuit.

The court of appeals took jurisdiction over decisions of the Court of Federal Claims by granting the government's petition for writ of mandamus.

The Court of Federal Claims had jurisdiction over this action pursuant to 28 USC § 1491(a)(1), granting jurisdiction to render judgment on any claim against the United States founded upon the Constitution, or any Act of Congress, or for liquidated or unliquidated damages not sounding in tort.

LEGAL PROVISIONS INVOLVED

US Constitution, Fifth Amendment:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . [.]"

28 USC § 153(a):

"Each bankruptcy judge shall serve on a full-time basis and shall receive as full compensation for his services, a salary at an annual rate that is equal to 92 percent of the salary of a judge of the district court of the United States as determined pursuant to section 135 [28 USCS § 135], to be paid at such times as the Judicial Conference of the United States determines."

28 USC § 1491(a)(1):

"The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

Regulations of the Judicial Conference of the United States for the Selection, Appointment and Reappointment of United States Bankruptcy Judges, § 5.01(b):

> "The court of appeals will decide whether or not to reappoint the incumbent judge. In making this decision, the court of appeals shall take into consideration the professional and career status of

the incumbent. Reappointment should not be denied unless the incumbent has failed to perform the duties of a bankruptcy judge according to the high standards of performance regularly met by United States bankruptcy judges."

STATEMENT OF THE CASE

Nature of Action

Plaintiff is a former Bankruptcy Judge for the US Bankruptcy Court for the Eastern District of Pennsylvania. He performed his duties over his 14-year term in accordance with the highest standards. In 2000, the US Court of Appeals for the Third Circuit did not reappoint plaintiff to a second, 14-year term. Under the reappointment regulation then in effect, plaintiff had a firm right to reappointment, and therefore, a property interest protected by the Fifth Amendment Due Process Clause.

Plaintiff brought this action in the US Court of Federal Claims as a result of his non-reappointment without rudimentary due process. Plaintiff was not charged with any deficiencies in performance; he requested, but was refused a hearing; and, no reason was ever given for his non-reappointment.

The Court of Federal Claims sustained its jurisdiction, denied the government's motions to dismiss, and ordered limited discovery by the government. The government petitioned the Federal Circuit for writ of mandamus. The court of appeals granted the petition, made contradictory statements concerning the jurisdiction of the Court of Federal Claims, and directed that court to dismiss plaintiff's complaint.

Statement of Facts and *Procedural History*

On December 13, 2000, plaintiff filed his complaint. The complaint alleges:

> "3. This is an action by a United States Bankruptcy judge for compensation mandated by 28 USC § 153, and restoration to office as an incident and collateral to any judgment. This court has jurisdiction of this action pursuant to 28 USC § 1491, granting jurisdiction to this court, to render judgment on any claim against the United States founded upon the Constitution, or any Act of Congress, or for liquidated or unliquidated damages not sounding in tort.
>
> * * *
>
> "6. 28 USC § 153 provides that each bankruptcy judge shall receive as full compensation for his services, a salary at an annual rate that is equal to 92 percent of the salary of a judge of the district court of the United States as determined pursuant to 28 USC § 135, to be paid at such time as the Judicial Conference of the United States determines. 28 USC § 153 is a 'money mandating' statute within the meaning of United States v. Testan, 424 US 392 (1976), and supports a claim for damages against the United States.
>
> "7. Reappointment of US Bankruptcy Judges for additional 14-year terms, is governed by Regulations of the Judicial Conference of the United States for the Selection, Appointment and Reappointment of United States Bankruptcy Judges ("the Regulations"), adopted pursuant to the Federal Courts Improvement Act of 1996, Pub. L. 104-317, 110 Stat. 3847 (1996).

"8. Section 5.01(b), Chapter 5 of the Regulations, says:

'The court of appeals will decide whether or not to reappoint the incumbent judge. In making this decision, the court of appeals shall take into consideration the professional and career status of the incumbent. Reappointment should not be denied unless the incumbent has failed to perform the duties of a bankruptcy judge according to the high standards of performance regularly met by United States bankruptcy judges [emphasis supplied].'"

The complaint has two counts. Count I alleges that plaintiff was deprived of property without due process of law, in violation the Fifth Amendment to the US Constitution. Plaintiff's property interest arises from § 5.01(b) of the Regulations above. Count II alleges violations of the Regulations.

On December 20, 2000, the government served its motion to dismiss the complaint for failure to state a claim upon which relief can be granted.

On December 4, 2002, corrected December 17, 2002, the trial court sustained its jurisdiction, held that the complaint stated a claim upon which relief may be granted, and denied the government's motion to dismiss [A-59].

On February 21, 2003, the parties served their joint status report. The government said it intended to move for reconsideration of the December 17, 2002, decision; and, if the trial court denied reconsideration, to request certification of an interlocutory appeal pursuant to 28 USC § 1292(d). Plaintiff said he intended "(1) to oppose

reconsideration because there is no ground therefor, and (2) to oppose interlocutory appeal because there is no substantial ground for difference of opinion, an interlocutory appeal would delay final resolution of the action, and piecemeal appellate litigation is undesirable."

On February 27, 2003, the government served its "motion for reconsideration" of the trial court ruling and to "dismiss this case for lack of jurisdiction or, in the alternative, failure to state a claim upon which relief may be granted."

On March 24, 2003, the trial court dismissed the government's motion for reconsideration with prejudice:

> "As we have previously stated 'reconsideration is appropriate only to remedy a manifest error of law or a mistake of fact, and the decision to grant such a motion lies within the discretion of the Court.
>
> "In addition, '[a] court will deny a motion for reconsideration if the movant uses it merely as an opportunity to re-litigate issues already decided by the court.'
>
> "In its motion, the Defendant is not only attempting to re-litigate issues previously decided, but it also raises new arguments relative to this Court's jurisdiction to entertain the Plaintiff's complaint. A motion for reconsideration is not the appropriate procedural device for such arguments [citations omitted]."

On May 27, 2003, the government served a renewed motion to dismiss this action.

On June 23, 2004, the trial court denied the government's renewed motion to dismiss for lack of subject matter jurisdiction [A-48].

On September 13, 2004, the government served its answer to the complaint, without affirmative defense.

On October 14, 2004, the government moved for interlocutory appeal of the December 17, 2002, and June 23, 2004, decisions.

On October 15, 2004, the trial court held a telephone status conference, and on October 19, 2004, confirmed the matters discussed therein:

> "The Government stated that it saw no particular discovery issues stemming from the Plaintiff's claims of alleged violations of constitutional due process or administrative procedures. The Plaintiff outlined his theory of the case by analogizing Judge Scholl's failure of reappointment to an adverse action against an employee. Counsel for the Plaintiff did not contemplate deposing any judges, which the Government said it would oppose, but intended deposing only those persons listed as Government witnesses. The parties then agreed on a discovery schedule."

> "As the hearing was concluding the Government advised the Court and Plaintiff that it had the day before filed a motion for an interlocutory appeal, and a motion staying discovery pending resolution of that process. This belated disclosure had the effect of wasting the hour just spent by the Court and the Plaintiff."

The court stayed discovery pending ruling on the motion for interlocutory appeal.

On January 10, 2005, the trial court lifted the stay of discovery and said:

> "On October 19, 2004, this Court issued an Order staying discovery pending our review of the Government's anticipated Motion to Certify Interlocutory Appeal and Stay Further Proceedings, which was filed on October 20, 2004. Because we find no reason to further delay discovery in this matter, we hereby lift the stay issued on October 19, 2004.
>
> "With respect to Defendant's Motion to Certify Interlocutory Appeal and to Stay Further Proceeds, we reserve ruling on the portion of Defendant's Motion that seeks to certify an interlocutory appeal. We deny the portion of Defendant's Motion that seeks to stay further proceedings."

On January 31, 2005, plaintiff served 19 interrogatories and a request to produce 19 categories of documents.

On February 18, 2005, the government served responses to the 19 document requests and produced 62 pages of documents.

The government objected to each document request on the grounds of judicial function, attorney-client, and work product privileges, but did not provide a privilege log.

On February 25, 2005, plaintiff asked the government to provide a privilege log and authority for judicial

function privilege. On February 28, 2005, the government served a privilege log, asserting judicial function, attorney-client, and work product privileges; and, on March 24, 2005, "provided authority in support of [its] assertion of a judicial function privilege."

On March 28, 2005, the government served responses to plaintiff's 19 interrogatories. The government objected to: interrogatories 2 - 11 on grounds of judicial function, attorney-client, and work product privileges, but did not provide a privilege log; interrogatories 12, 16, 17, and 18, on ground of "legal argument;" and, interrogatories 13 - 17, on grounds they are "vague, ambiguous, overly broad and unduly burdensome."

On March 30, 2005, the trial court denied the government's motion for interlocutory appeal [A-37].

On July 11, 2005, plaintiff moved, pursuant to Rule 37, RCFC, to impose negative evidentiary consequences on the government for not disclosing information material to plaintiff's claims; or, in the alternative, to overrule the government's objections to plaintiff's interrogatories and document requests; to order the government to prepare a privilege log for communications withheld in response to plaintiff's interrogatories; and, to compel the government to answer interrogatories.

The negative evidentiary consequence sought was preclusion of use at trial of documents and information the government refused to produce during discovery. Plaintiff sought to avoid being ambushed at trial.

Plaintiff moved to compel the government to answer his interrogatory # 1, requesting the name and nature of

testimony of each witness who will testify at trial.

On October 5, 2005, the trial court granted plaintiff's Rule 37 motion, ordering the government: to produce an amended privilege log containing legally required information; to produce all of the allegedly privileged documents listed in its privilege log for *in camera* review; and, to respond to plaintiff's interrogatory # 1 [A-29].

On October 21, 2005, the government filed a motion to stay all proceedings in this case in anticipation of filing its petition for writ of mandamus; and, on October 26, 2005, filed its petition for writ of mandamus, with an emergency motion for a stay. *In re United States*, Misc. No. 806.

On October 28, 2005, the trial court filed an order addressing the government's motion to stay and its petition for mandamus [A-25]; meanwhile, the Federal Circuit stayed the proceedings and directed plaintiff to answer the petition by November 4, 2005.

On November 29, 2005, the Federal Circuit directed the parties to file supplemental briefs on jurisdiction of the Court of Federal Claims. The order says:

> "Upon review of the papers submitted in this matter, the court desires additional briefing concerning the parties' views of the jurisdiction of the Court of Federal Claims in this matter.
>
> "The parties should address their views of the jurisdiction of the trial court on each count in the complaint."

On September 11, 2006, the Federal Circuit granted

the government's petition for writ of mandamus and directed the Court of Federal Claims to dismiss plaintiff's complaint [A2].

On October 26, 2006, plaintiff filed a timely petition, pursuant to Rule 35(b)(1)(A), F.R.A.P., for panel rehearing and rehearing en banc.

On December 8, 2006, the Federal Circuit denied plaintiff's petition for rehearing [A1].

REASONS FOR GRANTING THE WRIT

This court should review the grant of mandamus because the decision of the Federal Circuit clouds the jurisdictions of courts of appeals and trial courts. The decision impliedly held the trial court usurped its jurisdiction, whereas the court of appeals usurped the jurisdiction of the trial court.

Both courts treated the challenged action of the regional court of appeals with exceptional deference. The high station of the decision makers within the judicial branch should be irrelevant.

Plaintiff had well-settled rights to procedural due process in the decision not to reappoint him arising out of a mandatory regulation. While § 5.01(b) had not been analyzed in any prior judicial decision, its creation of a protected property interest in reappointment was clear from cases analyzing job protections in statutes, regulations, contracts, and employee handbooks at all levels of federal, state, and local government. Compared with the faculty handbook in the seminal case of *Perry v. Sindermann*, 408

US 593 (1972), § 5.01(b) was beyond debate.

The decision of the Federal Circuit conflicts with precedents of this court, including *Kerr v. US District Court*, 426 US 394, 402 (1976).

This was not a case for mandamus. The government had adequate means in other form to seek appellate review. The government could have timely moved in the Court of Federal Claims for leave to petition for interlocutory appeal. The government waited 22 months after the Court of Federal Claims denied its motion to dismiss to seek certification required by 28 USC § 1292(d)(2).

The government's right to issuance of the writ was not clear and indisputable. The trial court's extensive textual analysis of § 5.01(b), particularly the use of "should not be denied unless" as mandatory, was well supported and certainly not clearly wrong [A-74].

The Federal Circuit should have heeded the text of § 5.01(b). Instead, the court sought to confirm the text with a statement of intent [A-20]: "There is nothing in the language of section 5.01 that indicates the provision was *intended* to provide incumbent bankruptcy judges with the benefit of a firm right to reappointment." Where the text is unambiguous, there is no need to inquire into intent. *A fortiori*, the failure to find a statement of intent is no basis to reject the plain meaning.

The Federal Circuit erroneously characterized § 5.01(b) as simply providing "guidance," accepting the government's use of "guidelines" [A-18-20]. § 5.01(b) was issued as a "regulation" by the Judicial Conference of the United States pursuant to Congressional authority

granted it to prescribe "regulations" [A-19].

The Federal Circuit said the trial "court has jurisdiction" [A-16], but said several times the trial court erred in exercising jurisdiction [A-4, A-13, A-22]. Where an appellate court holds a trial court has jurisdiction but errs in exercising it, the matter is not so clear to warrant mandamus.

The Federal Circuit mistakenly relied on *Schwartz v. Mayor's Comm. on the Judiciary of the City of New York*, 816 F.2d 54, 55-57 (2d Cir. 1987)[A-20]. *Schwartz* is inapposite because there was no job protection like § 5.01(b) of the Regulations. Job protection is critical to the right of public employees to constitutional due process.

The Federal Circuit erred in finding that subjecting the Third Circuit to discovery "would cause a concrete and imminent harm" [A-23]. The trial court was extremely careful in its October 5, 2005, discovery ruling [A-31-34]. There is no reason to believe that material to be discovered concerns anything but performance evaluation, the sort of information routinely discovered from other agencies of government at all levels, as well as from private employers.

The trial court's determination that 28 USC § 153 is "money-mandating" was "determinative" both that the court has jurisdiction [A-67-70], and, on the merits, that plaintiff has sources on which to base his cause of action [A-87-90].

Decision is contrary to this court's precedents on granting mandamus

The All Writs Act grants to the federal courts the power to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 USC § 1651(a).

The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 US 33, 34-36 (1980); *Roche v. Evaporated Milk Assn.*, 319 US 21, 27 (1943).

Only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this "extraordinary" remedy. To ensure that mandamus remains an extraordinary remedy, the party seeking a writ bears the burden of proving that it has no other means of attaining the relief desired and that the right to issuance of the writ is "clear and indisputable." *Id.*

In incorrectly issuing a writ of mandamus, the court of appeals had done no more than substitute mandamus for an appeal, contrary to the statutes and the policy of Congress, which has restricted appellate review to final judgments of the district court. *Roche*. "Even in such cases appellate courts are reluctant to interfere with the decision of a lower court on jurisdictional questions which it was competent to decide and which are reviewable in the regular course of appeal."

Kerr said [426 US at 402]:

> "Our treatment of mandamus within the federal court system as an extraordinary remedy is not without good reason. As we have recognized before, mandamus actions such as the one involved in the instant case 'have the unfortunate consequence of making the [district court] judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants [appearing] before him' in the underlying case. More importantly, particularly in an era of excessively crowded lower court dockets, it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation. It has been Congress' determination since the Judiciary Act of 1789 that as a general rule "appellate review should be postponed... until after final judgment has been rendered by the trial court. A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by that judgment of Congress [citations omitted]."

Mandamus is an inappropriate mechanism to review decisions compelling discovery. The Federal Circuit overlooked that *Kerr, supra*, affirmed denial of petition for mandamus, where class action defendants sought to compel the district court to vacate two discovery orders, under Rule 37, F.R.Civ.P., which require state government agencies to produce documents as to which agencies claimed governmental privilege against disclosure of official information, where (1) petitioners asked, in essence, only that district court review challenged documents *in camera* before passing on whether each one individually should be disclosed; and, (2) in camera review

by district judge is available as alternative, less extreme, path to modification of challenged discovery orders.

Accord, In re Rambus, Inc., 2004 US App. Lexis 19422 (Fed.Cir.), denying petition for mandamus to direct the district court to vacate orders, entered after *in camera* review of documents, compelling petitioner to produce certain documents asserted to be protected by attorney-client and work-product privileges. Petitioner did not show "that the district court's relevant determinations, factual and legal, were clearly and indisputably incorrect." *A fortiori*, here, where the Court of Federal Claims had not yet conducted an *in camera* review and made a determination whether and which privilege, if any, applied.

The trial court's discovery ruling ordered the government to re-submit a privilege log; to submit documents under seal; to produce the name of each witness the government intends to call at trial and the nature of the testimony to be given [A-31-34].

It cannot be shown that this discovery ruling is "so plainly wrong as to indicate failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine," that is, that the decision is clearly and indisputably incorrect. *In re Cordis*, 769 F.2d 733, 737 (Fed. Cir. 1985)(declined to issue writ of mandamus ordering district court to dismiss action for improper venue). *Cordis* was cited in *In re Papst*, 55 Fed.Appx. 543 (Fed.Cir. 2003)(denied petition for writ of mandamus to direct two district courts to vacate their orders denying Papst's motions to dismiss declaratory judgment counts, and said petitioner has "high hurdle to transcend to show that its right to a certain result is 'clear and indisputable' and that mandamus is appropriate").

Third Circuit's exercise of its reappointment authority should be subject to judicial review

The Federal Circuit overlooked that this non-reappointment action does not involve review of a Third Circuit appellate decision in an Article III "Case" or "Controversy." A judge acts in his *administrative* capacity when he demotes and discharges a probation officer--such personnel decisions are not adjudicative. *Forrester v. White*, 484 US 219, 227-229 (1988).

"Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent." *Forrester*, citing *Ex parte Virginia*, 100 US 339, 348 (1880). *Forrester* recognized the "intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform." *Forrester* held a judge could be sued under 42 USC §§ 1983 and 2000e.

The power to reappoint bankruptcy judges is not an inherent Third Circuit power. The Third Circuit exercises its reappointment power pursuant to legislative authority. 28 USC § 152(a)(1). Congress could have designated the President or such officer as it thought proper, to appoint bankruptcy judges. US Constitution, Article II, § 2, cl. 2.

For example, the President appoints judges of the Court of Federal Claims pursuant to 28 USC § 171(a), which is declared to be an Article I court. Judges of the Court of Federal Claims are appointed for terms of 15 years. 28 USC § 172(a). Bankruptcy Judges are appointed for terms of 14 years and serve as judicial officers of the US district courts established under Article

III. 28 USC § 152(a)(1).

The Third Circuit should not be exempt from review of its reappointment decisions on Bankruptcy judges, when US senators hold public hearings, receive testimony, and vote publicly, on other federal judicial nominees appointed by the President, including judges of the Court of Federal Claims.

Judges in state courts are also subject to public review, through elections, retention elections, and appointments by governors and confirmation by state senates.

The Federal Circuit's concern about intrusion into the deliberations of the Third Circuit in deciding whether to reappoint a bankruptcy judge is misplaced. There is no national security secret to be protected. Bankruptcy judges are public officers with considerable authority over the affairs of our society. There is no harm to discovering why one bankruptcy judge is retained and another is not.

Bankruptcy courts are "vital" to the US justice system. A May 17, 1978, report of the Senate Judiciary Committee noted the "need for a functionally independent bankruptcy court has been demonstrated beyond question." *S.Rep. No. 989; 95th Cong., 2d Sess., S. 2266.* The report said:

> "There will be a twelve-year term of office for bankruptcy judges under new 28 USC § 152. The present six-year term is insufficient to attract the calibre of individual needed to perform the highly demanding and important functions of the office of bankruptcy judge. By doubling the term of office for future bankruptcy judges it is anticipated that a major goal of this reform legislation, the establishment of a

functionally independent bankruptcy court, can be further advanced."

The legislative history of the 1988 Bankruptcy and Magistrates Retirement and Annuities Act shows the high value Congress placed on bankruptcy judges. *134 Cong. Rec. H. 5391, 5394, 5395, 100th Cong., 2d Sess., July 11, 1988.*

"Mr. Speaker, this afternoon we are here to consider H.R. 4340. For the members of the Federal judicial family, this legislation represents a fundamental change in financial circumstances upon retirement or death. More importantly, this bill amounts to recognition in symbolic terms of the importance of the role played by U.S. bankruptcy judges ....

"As my colleagues know, the Federal court caseload has expanded dramatically over the past 25 years and has now achieved a level that could potentially overwhelm the Federal courts. The only way these courts have been able to continue to provide Americans with access to justice has been because of the contributions made by magistrates and bankruptcy judges. Their work is vital to the efficient work of the entire Federal justice system.

* * *

"Bankruptcy judges handle virtually all bankruptcy litigation in the first instance. Such cases often involve wide-ranging ancillary issues which the bankruptcy judges are also authorized to handle upon the consent of the parties. The number of bankruptcy petitions filed each year has increased from 226,471 in 1979 to

561,278 in 1987. * * * Without highly competent bankruptcy judges . . . to perform these duties, the number of Article III judges would need to be expanded dramatically. The services provided by these judicial officers is one of the primary reasons that the federal district courts have been able to cope with rising caseloads."

The caseload of bankruptcy courts has increased significantly since 1988. For fiscal year 2005, 1,782,643 bankruptcy petitions were filed in the United States.

In contrast, the caseload of district courts is much smaller. For fiscal year 2005, 322,848 civil and criminal cases were filed in district courts in the United States.

Bankruptcy courts handle some of the most complex legal and factual controversies in the federal judicial system, sometimes with billions of dollars at stake. For example, *In re Adelphia Communications Corp.*, 327 BR 143, 147 (Bank. SDNY 2005).[1]

The Federal Court decision means that reappointment authority, to whomever given, cannot be reviewed. This is contrary to law, as courts regularly review non-reappointment and non-renewal decisions where the sole authority to reappoint lies elsewhere, including with military authorities [*James v. Caldera*, 159 F.3d 573, 582 (Fed. Cir. 1998)]; the Merit System Protection Board [*Allgood v. Merit System Protection Board*, 13 Fed.Appx. 976 (Fed. Cir. 2001)], the Puerto Rico Secretary of

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[1]Reconsideration granted, but upheld, 327 BR 175 (2005), and affirmed by *Ad Hoc Adelphia Trade Claims Committee v. Adelphia Communications Corp.*, 337 BR 475 (SDNY 2006).

Education [*Figueroa v. Aponte-Roque*, 864 F.2d 947, 949 (1st Cir. 1989)], university trustees [*Delaware State College v. Ricks*, 449 US 250, 254 (1980); *Perry v. Sindermann*, 408 US 593 (1972)], school boards [*Mt. Healthy v. Doyle*, 429 US 274 (1977); *Thomas v. Contoocook Valley School District*, 150 F.3d 31, 37 (1st Cir. 1998)], electoral board of registrars [*Sales v. Grant*, 158 F.3d 768, 771 (4th Cir. 1998)], and township supervisors [*Everett v. Gould*, 94 Fed.Appx. 954, 955 (3d Cir. 2004)].

Judicial Conference Regulation § 5.01(b) gave plaintiff firm right of reappointment

The Federal Circuit overlooked its own precedents which relied on precedents of this court, while relying on two inapposite Second Circuit cases, *Schwartz, supra*, and *McMenemy v. City of Rochester*, 241 F.3d 279, 287 (2d Cir. 2001)(firefighter did not have property interest in promotion).

Stone v. FDIC, 179 F.3d 1368, 1374-1375 (Fed.Cir. 1999), held that the federal statutory scheme of 5 USC §§ 4303 and 7513(a) plainly creates a property interest in continued employment, because plaintiff was a civil service employee who could not be dismissed except for cause or unacceptable performance. "The statute therefore entitled Mr. Stone to continue in his position unless the agency could show he needed to be removed for cause or unacceptable performance."[2]

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[2]*Stone* vacated the final decision of the Merit Systems Protection Board sustaining plaintiff's removal from his position as bank examiner with defendant.

Stone relied on public teacher and professor decisions: *Wieman v. Updegraff*, 344 US 183 (1952); *Slowchower v. Board of Ed*, 350 US 551 (1956); *Connell v. Higginbotham*, 403 US 207 (1971); *Board of Regents v. Roth*, 408 US 564 (1972): *Perry v. Sindermann*, 408 US 593 (1972).

Stone relied on *Cleveland Bd of Ed v. Loudermill*, 470 US 532, 541 (1985), to determine what process is due a public employee before removing him from office; and, found that plaintiff was entitled to meaningful notice of the reasons he was removed and a meaningful opportunity to respond.

Here, like *Stone*, plaintiff had a property interest in continued employment under Regulation § 5.01(b).

Here, unlike *Stone*, plaintiff did not receive notice of the reasons he was not reappointed, and obviously, had no opportunity to respond. Plaintiff's right to reappointment was equal to or stronger than the rights to continued employment under the civil service standards upheld in *Stone* and *Loudermill*.

There is nothing in the record that supports the Federal Circuit's finding that § 5.01(b) "simply provided circuit courts with guidance" [A-18-20]. The trial court said [A-61]: "The Government has offered no documentary support or practical illustration that any Circuit Court has considered itself free to disregard applications for reappointment, or to consider those applications in disregard of the JCUS regulations."

Moreover, the Third Circuit actually followed the reappointment regulations, including § 5.01(b), and supplemented those regulations with several additional procedures.

The circumstances in *Schwartz* were not similar to those here; and, the policy choice made concerning reappointment of New York City Family Court judges is opposite of the policy choice Congress made concerning reappointment of bankruptcy judges. Family Court "[j]udges seeking reappointment are subject to the same discretionary standards as candidates seeking a judicial appointment for the first time." Congress authorized "the Judicial Conference to prescribe regulations which provide for the reappointment of incumbent bankruptcy judges that differ from the initial appointment of bankruptcy judges."[3]

The Federal Circuit overlooked that regulations providing job protection have created property interests in employment. For example, *Demesme v. Montgomery County*, 63 F.Supp.2d 678, 682 (DMD 1999)(plaintiff had property interest in his job, where applicable employment regulations protected him from arbitrary termination, thereby removing plaintiff's employment from background Maryland rule of at-will employment).

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[3]The Federal Courts Improvement Act of 1996, § 304, 110 Stat. 3847, which amended the reappointment procedure for bankruptcy judges, including to treat incumbent judges differently from initial applicants.

Conclusion

Petitioner David A. Scholl asks the court to grant his petition for a writ of certiorari and to review the September 11, 2006, judgment of the Court of Appeals for the Federal Circuit.

Respectfully submitted,

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Michael S. Fettner
LYMAN & ASH

Counsel for Petitioner

IN RE UNITED STATES, Petitioner.

Miscellaneous No.806

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2006 U.S. App. LEXIS 32259

December 8, 2006, Decided

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Respondent, and a response thereto having been invited by the court and filed by the Petitioner, and the petition for rehearing and response, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

IN RE UNITED STATES, Petitioner.

Miscellaneous No. 806

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

463 F.3d 1328
September 11, 2006, Decided

SCHALL, GAJARSA, and PROST, Circuit Judges.

OPINION: [*1329] SCHALL, Circuit Judge.
The United States petitions for a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a). n1 In its petition, the government challenges various rulings of the United States Court of Federal Claims in the case of Scholl v. United States, No. 00-737C (Fed. Cl.). All proceedings in the Court of Federal Claims have been stayed pending our consideration of the petition.

> n1 Section 1651(a) provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

This case involves a suit, purportedly under the Tucker Act, 28 U.S.C. § 1491(a)(1), by David A. Scholl, a former bankruptcy judge of the United States District Court for the Eastern District of Pennsylvania. In his suit, Mr. Scholl alleges that the denial of his reappointment as a bankruptcy judge by the United States Court of Appeals for the Third

Circuit was in violation of his right to due process under the Fifth Amendment to the Constitution and certain regulations relating to the reappointment of bankruptcy judges that have been promulgated by the Judicial Conference of the United States.

Because the Court of Federal Claims should not have exercised jurisdiction over Mr. Scholl's suit and because the requirements for the writ of mandamus are met, we grant the government's petition for a writ of mandamus and direct the court to dismiss Mr. Scholl's complaint.

BACKGROUND

I.

In each federal judicial district, the bankruptcy judges in regular active service "constitute a unit of the district court . . . known as the bankruptcy court for that district." 28 U.S.C. § 151. In each district, bankruptcy judges are appointed by a majority of the active judges of the circuit court of appeals in which the district is located. Id. § 152(a)(1). Each appointment is for a term of fourteen years. Id. Section 303 of the Federal Court's Improvement Act of 1996, Pub. L. No. 104-317, § 303, 110 Stat. 3852 (1996), codified as a note to section 152, provides that "[w]hen filling vacancies, the court of appeals may consider reappointing incumbent bankruptcy judges under procedures prescribed by regulations issued by the Judicial Conference of the United States." The Judicial Conference of the United States (the "Judicial Conference") "is the statutorily created body of federal judges that establishes policy for the

administration of the Judicial Branch." Williams v. United States, 240 F.3d 1019, 1061 n.24 (Fed. Cir. 2001) (citing 28 U.S.C. § 331). The Judicial Conference is composed of the Chief Justice of the United States, "the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit." 28 U.S.C. § 331. The Third Circuit generally follows the Judicial Conference regulations, although it has never formally adopted them.

In 2000, the year in which Mr. Scholl was denied reappointment, sections 5.01(b) [*1330] and (c) of Chapter 5 of the Judicial Conference regulations provided:

> (b) The court of appeals will decide whether or not to reappoint the incumbent judge. In making this decision, the court of appeals shall take into consideration the professional and career status of the incumbent. Reappointment should not be denied unless the incumbent has failed to perform the duties of a bankruptcy judge according to the high standards of performance regularly met by United States bankruptcy judges.
>
> (c) If the court of appeals determines by majority vote of the active judges of that court that the incumbent bankruptcy judge appears to merit reappointment, the court shall follow the procedures set forth in following sections 5.02 and 5.03.

Section 5.02 of the regulations provided that, if the court of appeals determined that an incumbent bankruptcy judge who was willing to be reappointed appeared to merit reappointment, the circuit executive of the court would cause to be published a public notice stating that the court was considering the judge for reappointment and inviting comments from members of the bar and the public. Section 5.03 of the regulations dealt with the process by which the court of appeals would decide on the reappointment after comments from the bar and public were reviewed. n2

n2 In 2001, the Judicial Conference amended section 5.01(b) of Chapter 5 of the regulation by deleting the sentence that began: "Reappointment should not be denied unless." This amendment was made in order to avoid the creation of a presumption of reappointment. See Report of the Proceedings of the Judicial Conference of the United States, March 14, 2001, available at www.uscourts.gov/judconf/01-mar.pdf. The Judicial Conference also amended the regulations to eliminate the requirement in section 5.01(c) that the court of appeals take an initial vote to determine whether the incumbent appeared to merit reappointment, thereby providing that the court of appeals could proceed directly to the public comment period. Id.

II.

On August 27, 1986, Mr. Scholl was appointed to the Bankruptcy Court for the Eastern District of Pennsylvania by the Court of Appeals for the Third Circuit. His fourteen-year term of appointment ended on August 26, 2000. In a letter addressed to

the Chief Judge of the Third Circuit, dated December 29, 1999, Mr. Scholl expressed his "willingness to accept reappointment." A preliminary vote of the active judges of the Third Circuit was held, and Mr. Scholl received enough votes to have his reappointment proceed through the public notice and comment process. The process involved notices in local newspapers seeking comments on the proposed reappointment, as well as 1,165 questionnaires sent to attorneys and bankruptcy trustees who had appeared before Mr. Scholl during his tenure as a judge. Approximately 300 of the questionnaires were returned to the court of appeals. Mr. Scholl was provided with copies of all comments and a detailed chart analyzing the responses to the questionnaires, to which he submitted a detailed response. Upon reviewing the comments, responses to the questionnaires, and Mr. Scholl's response, the active judges of the Third Circuit voted 11-to-1 against reappointment of Mr. Scholl. In a May 25, 2000 letter, Mr. Scholl was informed of the adverse vote, and was told that the process to appoint a replacement was being initiated. Mr. Scholl served as a bankruptcy judge until his term ended on August 26, 2000.

III.

After the expiration of his term, Mr. Scholl brought the present action in the Court of Federal Claims, purportedly under [*1331] the Tucker Act. In Count I of his complaint, he alleges, that as a bankruptcy judge, he had a "property interest in continued employment that was taken in violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution." Compl. P19. In Count II of his

complaint, he alleges that the failure to reappoint him was in violation of the Judicial Conference regulations. Id. P37. Mr. Scholl asserts that 28 U.S.C. § 153(a), the pay statute for bankruptcy judges, and the Judicial Conference regulations support Tucker Act Jurisdiction in the Court of Federal Claims.

In due course, the government moved, pursuant to Rule 12(b)(1) of the Rules of the Court of Federal Claims, to have Mr. Scholl's suit dismissed for lack of jurisdiction. n3 The government argued that the case should be dismissed for lack of subject matter jurisdiction under the Tucker Act because Mr. Scholl did not have a firm right to reappointment under a money mandating statute, regulation of an executive department, or Constitutional provision. The court rejected this contention in Scholl I, 54 Fed. Cl. at 643-44, 650. The court ruled that under the applicable Judicial Conference regulations, "Judge Scholl had a firm right to be reaopointed as a [bankruptcy] judge, absent the showing that he had failed to perform according to high standards." The government made a renewed motion to dismiss for lack of subject matter jurisdiction, which was denied in Scholl v. United States, 61 Fed. Cl. 322 (2004) ("Scholl II").

n3 The government also moved to have Mr. Scholl's suit dismissed for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6). Scholl v. United States, 54 Fed. Cl. 640, 643 (2002) ("Scholl I").

Four months later, the government filed a "Motion to Certify Interlocutory Appeal and to Stay Further Proceedings." In its motion, the government argued that whether Mr. Scholl states a claim when he seeks back pay for not being reappointed and whether the Court of Federal Claims possesses jurisdiction to review the Third Circuit's decision not to reappoint him are controlling questions of law, and that if the decision of the trial court is reversed with respect to either issue, dismissal of the suit would result. Interlocutory Appeal Mot. at 3-4, 9-11. The government further argued that whether a "firm right" to reappointment exists is an issue of first impression upon which there are substantial grounds for a difference of opinion. Id. at 6-8. Finally, the government asserted that the trial court should grant a discretionary stay because "discovery in this case likely would involve a sensitive and potentially burdensome inquiry into the basis for the decision of the Third Circuit judges . . . ." Id. at 11-12.

The Court of Federal Claims determined that the government's motion was untimely and that, in any event, the government had failed to satisfy the requirements for an interlocutory appeal. Consequently, the court denied certification for interlocutory appeal in Scholl v. United States, 68 Fed. Cl. 58 (2005) ("Scholl III"). Mr. Scholl then moved to compel the government's answer to an interrogatory seeking the name and nature of the testimony of each witness that the government intended to call at trial. The government's response opposed Mr. Scholl's motion to compel and also presented a "Renewed Motion for Certification of an Interlocutory Appeal."

In its response, the government stated that "[i]f Mr. Scholl intends to challenge the merits of the decision not to appoint" him, "the likely witnesses would be one or more Third Circuit judges." Government's Opp'n to Mot. to Compel Disc. at 3. The government also stated that the decision [*1332] whether to reappoint a bankruptcy judge "is sufficiently judicial in nature to warrant the assertion of the judicial function privilege." n4 Id. at 7. The government further stated that communications between attorneys working for the Third Circuit and the Third Circuit judges were protected by attorney-client privilege. Id. at 7-10. Finally, in support for its Renewed Motion for Certification of an Interlocutory Appeal, the government, among other arguments, asserted that "[b]asic separation-of-powers principles" prevent an Article I court (the Court of Federal Claims) from reviewing a Judicial Branch appointment decision. Id. at 16.

> n4 "Judges, like Presidents, depend upon open and candid discourse with their colleagues and staff to promote the effective discharge of their duties." In re Certain Complaints Under Investigation by an Investigating Comm., 783 F.2d 1488, 1519 (11th Cir. 1986) ("Hastings"), quoted in In re Grand Jury, 821 F.2d 946, 957 (3rd Cir. 1987). "[T]here exists a [qualified] privilege . . . protecting confidential communications among judges and their staffs in the performance of their judicial duties." Hastings, 783 F.2d at 1520, cited in Smith v. U.S. Dist. Court for the S. Dist. of Ill., 956 F.2d

> 647, 650 (7th Cir. 1992). "The judicial privilege is grounded in the need for confidentiality in the effective discharge of the federal judge's duties. In the main, the privilege can extend only to communications among judges and others relating to official judicial business such as, for example, the framing and researching of opinions, orders, and rulings." Hastings, 783 F.2d at 1520.

The Court of Federal Claims, inter alia, (i) granted the motion to compel the interrogatory answer insofar as it related to Count II of the complaint, (ii) directed the government to submit under seal to the court all documents in its privilege log for in camera review, (iii) issued an order to show cause why the Due Process claim in Count I should not be dismissed for lack of subject matter jurisdiction, and (iv) denied the Renewed Motion for Certification of an Interlocutory Appeal for the same reasons that it had denied the original motion. Scholl v. United States, 69 Fed. Cl. 395 (2005) ("Scholl IV"). The government then petitioned this court for a writ of mandamus. As noted above, proceedings in the Court of Federal Claims have been stayed pending our consideration of the petition.

DISCUSSION

I.

A writ of mandamus is a "'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" Cheney v. United States Dist. Court, 542 U.S. 367, 380, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004) (quoting Ex parte Fahey, 332 U.S. 258,

259-60, 67 S. Ct. 1558, 91 L. Ed. 2041 (1947)). The Supreme Court has explained that "[t]he traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine the court against which mandamus is sought to a lawful exercise of its prescribed jurisdiction." Id. (quoting Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26, 63 S. Ct. 938, 87 L. Ed. 1185 (1943)).

Three conditions must be satisfied before a court will issue a writ of mandamus. First, "the party seeking issuance of the writ must have no other adequate means to attain the relief he desires." Id. (quoting Kerr v. United States Dist. Court for Northern Dist., 426 U.S. 394, 403, 96 S. Ct. 2119, 48 L. Ed. 2d 725 (1976)). Second, "the petitioner must satisfy the burden of showing that his right to issuance of the writ is 'clear and indisputable.'" Id. at 381 (quoting Kerr, 426 U.S. at 403). Third, "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." Id. (citing Kerr, 426 U.S. at 403).

[*1333] II.

In its petition for mandamus, the government argues that the Court of Federal Claims "made an extraordinary claim of power to review" the Third Circuit's decision not to reappoint Mr. Scholl as a bankruptcy judge. Pet. at 1. The government asserts:

> Congress vested that appointment power exclusively in the Courts of Appeals, and declined to provide would-be judicial officers

> with a private right of action in the [Court of Federal Claims]. Review of the Third Circuit's appointment decisions by an Article I court would raise serious Appointments Clause and separation-of-powers problems, which by themselves warrant immediate mandamus review.

Id. The government further asserts that "the [Court of Federal Claims] has now imposed an additional, concrete, and imminent harm on the Third Circuit, by requiring it to turn over for in camera review documents containing Circuit Judges' internal deliberations and other privileged and confidential communications relating to the appointment decision at issue." Id. In view of the trial court's denials of certification for interlocutory appeal and its order compelling discovery, the government concludes that no remedy other than mandamus is available to prevent "imminent, concrete, and irreparable harm" to the Third Circuit, the separation of powers, and the deliberative process. Id. at 1, 26-30.

Mr. Scholl responds that the government has "failed to meet the requirements of the drastic remedy of mandamus and show that the circumstances here are extraordinary." Scholl's Answer to Pet. at 10. According to Mr. Scholl, "the trial court did not usurp power; its decisions are not clearly and indisputably incorrect; relief by appeal from final judgment is available . . . ." Id.

After the mandamus petition and Mr. Scholl's response were filed, we asked the parties to brief, and we heard oral argument on, the question of the

jurisdiction of the Court of Federal Claims under the Tucker Act. We now grant the government's petition for mandamus. We do so because the Court of Federal Claims erred by exercising jurisdiction in this case and because the requirements for mandamus have been met. We begin with the matter of jurisdiction.

III.

In relevant part, the Tucker Act gives the Court of Federal Claims "jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, . . . or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). However, the Tucker Act "is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." United States v. Testan, 424 U.S. 392, 398, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976). Thus, "in order to invoke jurisdiction under the Tucker Act, a plaintiff must point to a substantive right to money damages against the United States." Hamlet v. United States, 63 F.3d 1097, 1101 (Fed. Cir. 1995) (citing Testan, 424 U.S. at 398). This means that a Tucker Act plaintiff must assert a claim under a separate money-mandating constitutional provision, statute, or regulation, the violation of which supports a claim for damages against the United States. See Todd v. United States, 386 F.3d 1091, 1094 (Fed. Cir 2004); Holley v. United States, 124 F.3d 1462, 1465 (Fed. Cir. 1997); Adkins v. United States, 68 F.3d 1317, 1321 (Fed. Cir. 1995). A substantive law is money-mandating only if it "can

fairly be interpreted [*1334] as mandating compensation by the Federal Government for the damage sustained." United States v. Mitchell, 463 U.S. 206, 217, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983).

A pay statute may serve as the basis for Tucker Act jurisdiction. For example, in James v. Caldera, we stated that 37 U.S.C. § 204 "serves as a money-mandating statute." 159 F.3d 573, 581 (Fed. Cir. 1998). That is because section 204 provides that "a member of a uniformed service who is on active duty" is "entitled to the basic pay of the grade to which assigned." In a given case, whether Tucker Act jurisdiction exists is a question of law that we review without deference to the decision of the trial court. See Core Concepts of Fla., Inc. v. United States, 327 F.3d 1331, 1334 (Fed. Cir. 2003); Clark v. United States, 322 F.3d 1358, 1362 (Fed. Cir. 2003).

Mr. Scholl asserts two bases for Tucker Act jurisdiction in this case. First, he points to 28 U.S.C. § 153(a), which is the pay statute for bankruptcy judges. He alleges that, in the course of considering him for reappointment, the Third Circuit acted in a manner that violated his right to due process under the Fifth Amendment to the Constitution and deprived him of the pay mandated by section 153(a). Second, he points to the Judicial Conference regulations. He asserts that he "performed the duties of a bankruptcy judge according to the high standards of performance regularly met by United States bankruptcy judges" and that, consequently, he was entitled to be reappointed. He argues that the

Third Circuit violated the regulations when it did not reappoint him. We address section 153(a) first.

IV.

Section 153(a) clearly is a money-mandating statute, for it provides that a bankruptcy judge "shall receive as full compensation for his services, a salary at an annual rate that is equal to 92 percent of the salary of a judge of the district court of the United States as determined pursuant [28 U.S.C. §] 135, to be paid at such times as the Judicial Conference of the United States determines." However, section 153(a)'s money-mandating command only benefits an individual who actually holds the position of bankruptcy judge. See Testan, 424 U.S. at 402 ("The established rule is that one is not entitled to the benefit of a position until he has been duly appointed to it."). Once Mr. Scholl's term as a bankruptcy judge ended, he no longer was entitled to the pay mandated by section 153(a). See James, 159 F.3d at 581 ("Once James' term of enlistment ended, he no longer was entitled to pay under 37 U.S.C. § 204, because he was no longer a service member.").

Apparently recognizing the problem that he faces under section 153(a), Mr. Scholl argues that his "non-reappointment [was] a form of discharge." Scholl's Supplemental Br. on Jurisdiction at 8. This argument is without merit. It is true that a claim of unlawful discharge may support Tucker Act jurisdiction. Testan, 424 U.S. at 402 ("[T]he employee is entitled to the emoluments of his position until he has been legally disqualified."); James, 159 F.3d at 581 ("If an enlisted member of the Armed Services is wrongfully discharged before the end of his or her

current term of enlistment, the right to pay conferred by § 204 continues and serves as the basis for Tucker Act jurisdiction."). However, for two reasons this proposition does not help Mr. Scholl. First, he was not discharged during his 14-year term. He served until the end of his term and was fully paid for his services. Second, it is simply incorrect to say that non-reappointment is a form of discharge. Non-reappointment and discharge are two entirely different things.

[*1335] Because section 153(a) is a money-mandating statute, insofar as Mr. Scholl bases his suit in the Court of Federal Claims on section 153(a), the court has jurisdiction. See Fisher v. United States, 402 F.3d 1167, 1173 (Fed. Cir. 2005) (en banc in relevant part) ("If the court's conclusion is that the Constitutional provision, statute, or regulation meets the money-mandating test, the court shall declare that it has jurisdiction over the cause, and shall then proceed with the case in the normal course."). At the same time, however, as just discussed, it is clear from the face of his complaint that Mr. Scholl does not come within the reach of section 153(a). For that reason, the Court of Federal Claims should have dismissed Mr. Scholl's section 153(a) claim under its Rule 12(b)(6) for failure to state a claim upon which relief could be granted. See id. at 1175-76 ("Assuming that the Court of Federal Claims has taken jurisdiction over the cause as a result of the initial determination that plaintiff's cause rests on a money-mandating source, the consequence of a ruling by the court on the merits, that plaintiff's case does not fit within the scope of the source, is simply

this: plaintiff loses on the merits for failing to state a claim on which relief can be granted."). n5

> n5 In Scholl IV, the Court of Federal Claims wrote: "Because the Due Process Clause of the Fifth Amendment is not a money-mandating provision of the Constitution, see Mullenberg v. United States, 857 F.2d 770, 773 (Fed. Cir. 1988), the Court likely lacks jurisdiction to hear Count 1 of the Plaintiff's Complaint." 69 Fed. Cl. at 395. The court then ordered Mr. Scholl to show cause why Count 1 (based on the Due Process Clause) should not be dismissed for lack of subject matter jurisdiction. Id. We agree that because the Due Process Clause is not money-mandating, it may not provide the basis for jurisdiction under the Tucker Act.

V.

We turn now to the issue of whether the Judicial Conference regulations support Tucker Act jurisdiction in this case. As seen, the Court of Federal Claims held that based on section 5.01(b) of the Judicial Conference regulations, "Judge Scholl had a firm right to be reappointed as a judge, absent the showing that he had failed to perform according to high standards." Scholl I, 54 Fed. Cl. at 650.

In James, we stated that "[c]onceivably, Tucker Act jurisdiction . . . could exist if, as matter of law, the regulations gave one in James's circumstances 'a firm right' to have his enlistment extended." 159 F.3d at 582 (citing Austin v. United

States, 206 Ct. Cl. 719, 724 (1975)). Pointing to James, Mr. Scholl argues that the Court of Federal Claims correctly held that section 5.01 of the Judicial Conference regulations provided the basis for Tucker Act jurisdiction in this case. He contends that he "had a property interest in his office of bankruptcy judge because he had a firm right of reappointment--the Third Circuit was bound to follow Judicial Conference regulations." Scholl's Reply Supplemental Br. on Jurisdiction at 1. Mr. Scholl's contention is based on the premise that wrongful non-reappointment is a form of wrongful discharge. Scholl's Supplemental Br. on Jurisdiction at 12, 16. Mr. Scholl reasons that "[t]he circumstances involving plaintiff are similar to tenured professors at colleges and universities," who serve under a series of one-year contracts and "have the right of renewal of their contracts upon expiration." Id. at 17 (citing Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972)).

The government disagrees. It argues that because section 5.01 did not give Mr. Scholl a firm right or protected interest in reappointment, it could not form the basis for Tucker Act jurisdiction over Mr. Scholl's suit. It contends that "[f]or the [*1336] administrative convenience of the Courts of Appeals, the Judicial Conference has adopted procedural guidelines for making reappointment decisions. However, these guidelines do not create an enforceable right in reappointment." Government's Supplemental Br. on Jurisdiction at 4. The government reasons that because "the decision whether to reappoint a bankruptcy judge is within the sole discretion of the regional Court of Appeals,"

Mr. Scholl "has no legally protected interest in reappointment. A fortiori, he cannot show a substantive right to money damages." Id. at 2-3. We agree with the government. n6

> n6 The government makes an additional argument with respect to the Judicial Conference regulations. It contends that the regulations are not, in the words of the Tucker Act, a "regulation of an executive department," see 28 U.S.C. § 1491(a)(1), and thus cannot provide the basis for jurisdiction under the Tucker Act. As seen, the Tucker Act, inter alia, gives the Court of Federal Claims "jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department." 28 U.S.C. § 1491(a)(1) (emphasis added). We do not address this alternative argument by the government. See Ruhrgas Ag v. Marathon Oil Co., 526 U.S. 574, 584, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999) (stating that there is no "jurisdictional hierarchy," so that if there are two reasons to dismiss a case for lack of jurisdiction, either reason, by itself, can serve as the basis for dismissing the case).

As seen above, section 303 of the Federal Courts Improvement Act of 1996 provides that "[w]hen filling vacancies, the court of appeals may consider reappointing incumbent bankruptcy judges under procedures prescribed by regulations issued by the Judicial Conference of the United States." As in effect in 2000, section 5.01 of the Judicial Conference

regulations stated that "the court of appeal shall take into consideration the professional and career status of the incumbent." The regulations further stated that "[r]eappointment should not be denied unless the incumbent has failed to perform the duties of bankruptcy judge according to the high standards of performance regularly met by United States bankruptcy judges." n7

> n7 As mentioned above, in 2001, the Judicial Conference amended sections 5.01(b) and (c) by deleting a sentence to avoid creating a presumption of reappointment, eliminating the requirement of an initial vote to determine whether the incumbent appeared to merit reappointment, and providing that the court of appeals could proceed directly to the public comment period. See Report of the Proceedings of the Judicial Conference of the United States, March 14, 2001, available at http://www.uscourts.gov/judconf/01-mar.pdf.

We do not agree with the Court of Federal Claims that section 5.01 provided Mr. Scholl with a firm right to be reappointed unless "he had failed to perform according to high standards." As in effect in 2000, section 5.01 simply provided circuit courts with guidance in the process for the reappointment of incumbent bankruptcy judges. There is nothing in the language of section 5.01 that indicates the provision was intended to provide incumbent bankruptcy judges with the benefit of a firm right to reappointment. Indeed, one of our sister circuits has recognized under similar circumstances that there is no firm right to reappointment. See Schwartz v.

Mayor's Comm. on the Judiciary of the City of N.Y., 816 F.2d 54, 55-57 (2d Cir. 1987) (holding that a New York City Family Court judge had no constitutionally protected property right to reappointment after her ten-year term expired and the mayor decided not to reappoint her, and explaining that "the fact that many, or even most, incumbent judges have been reappointed cannot operate to raise appellant's 'subjective expectation' to a constitutionally protected right . . . . Appellant has failed entirely to demonstrate any 'mutually [*1337] explicit understanding' sufficient to establish a property right" (citing Perry, 408 U.S. at 601; Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972))); see also McMenemy v. City of Rochester, 241 F.3d 279, 287 (2d Cir. 2001) (stating that "because McMenemy had no legitimate claim of entitlement to--and therefore no property interest in--the position to which he aspired, the procedures used to fill that job are immaterial to his due process claim" and citing Schwartz, 816 F.2d at 57, as holding that "procedures requiring notice and opportunity to be heard with respect to a decision on whether to reappoint a family court judge did not create a property or liberty interest where there was no underlying property or liberty interest in the job").

Furthermore, assuming, arguendo, non-compliance with section 5.01, there is nothing in the language of the section that can be accurately characterized as money-mandating. See Mitchell, 463 U.S. at 216-17 ("[T]he claimant must demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the

damages sustained.'" (quoting Testan, 424 U.S. at 400 (quoting Eastport S.S. Corp. v. United States, 178 Ct. Cl. 599, 607, 372 F.2d 1002 (1967))); Samish Indian Nation v. United States, 419 F.3d 1355, 1366 (Fed. Cir. 2005) ("[T]his statutory language and structure is not reasonably read as demonstrating congressional intent to establish a damage remedy under the [Indian Self-Determination and Education Assistance Act] for non-payment of the underlying benefits, based on the wrongful refusal to accord the Samish federal recognition between 1975 and 1996 (thereby precluding entry into a self-determination contract."). For the foregoing reasons, we hold that the Court of Federal Claims erred as a matter of law in holding that the Judicial Conference regulations support Tucker Act jurisdiction in this case. n8

> n8 Mr. Scholl's comparison of his circumstance to that of the untenured professor in Perry v. Sindermann fails because, as a bankruptcy judge, he has no "legitimate claim of entitlement" based on "policies and practices of the institution." 408 U.S. at 602-03. As seen, neither section 153(a), the Judicial Conference Guidelines, Due Process Clause case law, nor the Tucker Act provide such an entitlement or "firm right."

VI.

Having determined that the Court of Federal Claims erred in exercising jurisdiction in this case, we have no difficulty concluding that the government is entitled to issuance of a writ of mandamus. That is the case, we think, because the three conditions required for mandamus set forth by Cheney have

been met. See Cheney, 542 U.S. at 380-81 (citing Kerr, 426 U.S. at 403). First, the government has "no other adequate means to attain the relief [that it] desires." The principal relief that the government desires in this case is preventing Mr. Scholl from obtaining discovery from judges and employees of the United States Court of Appeals for the Third Circuit with respect to the court's decision not to reappoint him as a bankruptcy judge. Because the Court of Federal Claims has (i) denied the government's motion to dismiss, (ii) granted Mr. Scholl's motion to compel, and (iii) denied the government's original and renewed Motion for Certification of an Interlocutory Appeal, there is no way, other than mandamus, that the government can obtain the relief it seeks. Second, we think the government's right to issuance of the writ is "clear and indisputable." For the reasons set forth above, the Court of Federal Claims clearly erred by [*1338] not dismissing this case. While we do not decide the power of appointment and judicial privilege issues raised by the government, we see no point in subjecting the judges and employees of the Third Circuit to discovery into the court's decision-making process in the setting of a case that clearly, as a matter of law, should be dismissed. Finally, we find, in our discretion, that "the writ is appropriate under the circumstances." Without ordering dismissal of Mr. Scholl's case through our mandamus power, the internal deliberations of the Third Circuit could be subject to discovery. The government is correct that this would cause a concrete and imminent harm that cannot be remedied after the fact. n9

n9 Our opinion should not be read to suggest that mandamus is available as a remedy anytime the government believes that jurisdiction in the Court of Federal Claims is lacking. The circumstances of this case--clear error in the exercise of jurisdiction, combined with the specter of discovery into the deliberations of a federal appeals court relating to the reappointment of a bankruptcy judge--are unique.

CONCLUSION

For the foregoing reasons, we grant the government's petition for a writ of mandamus. We hereby direct the Court of Federal Claims to dismiss Mr. Scholl's complaint.

COSTS

Each party shall bear its own costs.

PETITION FOR WRIT OF MANDAMUS IS GRANTED.

DAVID A. SCHOLL, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.

No. 00-737C

UNITED STATES COURT OF FEDERAL CLAIMS

69 Fed. Cl. 395
October 28, 2005, Filed

LAWRENCE M. BASKIR, Judge.

[*395] **ORDER/OPINION**

BASKIR, Judge.

On October 21, 2005, the Defendant filed a Motion for a stay of all proceedings in this case in anticipation of its filing some days hence a Petition for a Writ of Mandamus with the U.S. Court of Appeals for the Federal Circuit. In the alternative, the Defendant requested an interim stay to allow the Federal Circuit to consider a potential stay motion with that court. On October 24, the Court issued an Order reminding the parties that they must still adhere to the November 1 deadline for various filings as required by our Order of October 5, 2005.

The Petition for Mandamus was filed in the Court of Appeals on October 26, 2005. A courtesy copy of the Petition arrived in our chambers on Thursday morning, October 27, [*396] 2005 (without a copy of the emergency motion for a stay,

which the Defendant also filed with the Court of Appeals on October 26). Thus, the Court has had the Petition for barely 24 hours.

The Court is not prepared to rule on the Defendant's Motion for a stay at this time. The Defendant simply did not file its Motion for a stay with enough time to review the promised Petition, and for the Plaintiff to file a response, before the impending November 1 deadline. The Government's tardy filings are habitual in this case. For example, in this Court's Order of March 30, 2005, we denied the Defendant's Motion to certify the case for interlocutory appeal in part because it was grossly untimely, coming, as it did, more than two years after the first of the decisions it sought to appeal.

This Court's Order of April 23, 2003, made it clear that the Defendant must consolidate all of its remaining Rule 12(b) theories in one final motion, rather than continuing to file successive motions to dismiss. Even so, the Defendant now asserts separation of powers and Appointments Clause arguments in support of its attack on this Court's jurisdiction. The new arguments, suggested for the first time in an August 25, 2005, opposition to Plaintiff's Motion to Compel, come more than two years after the Court forbade piecemeal challenges.

While the Court is not prepared to rule on the Motion for a stay at this time, we have serious doubts about the merits of the Defendant's Petition. As the Defendant acknowledges in its Petition, mandamus is an extraordinary writ that is appropriate only when there is no other adequate

means to obtain relief. Kerr v. U.S. Dist. Court, 426 U.S. 394, 402-03, 96 S. Ct. 2119, 48 L. Ed. 2d 725 (1976). Not so in this case. The Court previously invited the Defendant to move for certification for interlocutory appeal of a discovery production ruling in the event such a ruling is made. See Order of October 5, 2005. This Court has not yet made a discovery production ruling that would require the Defendant to turn over unprotected any allegedly privileged documents to the Plaintiff.

The Petition argues that the mere delivery of the allegedly privileged documents to the Court for in camera review would cause irreparable harm to the Defendant. In camera review is not a public disclosure of documents. Quite the contrary, it is a "highly appropriate and useful means of dealing with claims of governmental privilege." Kerr, 426 U.S. at 406. Even the President is subject to have his allegedly privileged documents reviewed in camera by a court of law. See Nixon v. United States, 418 U.S. 683, 706, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) ("Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.").

Other arguments in Defendant's Petition are unconvincing. Defendant's claims of irreparable harm resulting from the Court's very exercise of jurisdiction in this case are especially curious,

considering it waited almost five years of litigating the case before raising the separation of powers/ Appointments Clause argument.

The Petition is misleading in its claims that certain documents requested during discovery fall under the deliberative-process privilege. While it is possible that the privilege could apply to certain documents, the Defendant has not claimed such a privilege to this Court. Both its brief in opposition to the Plaintiff's Motion to Compel and its privilege log are notably silent with respect to the deliberative-process privilege.

The Court would like to reiterate its ruling of October 5. In that Order, the Defendant was ordered to produce an amended privilege log containing the legally required information. In addition, the Defendant was ordered to produce all of the allegedly privileged documents listed in its privilege log for in camera review, and was directed to respond to Plaintiff's Interrogatory 1, which asked the Defendant to identify its expected witnesses at trial.

The Plaintiff was also ordered to show cause why Count 1 of his Complaint, alleging [*397] procedural due process errors in the decision-making process, should not be dismissed for lack of subject matter jurisdiction. If Count 1 is dismissed, it is possible that some, and conceivably all, of the documents listed in the privilege log will cease to be relevant to Plaintiff's claim.

The Court has reluctantly decided to grant the Defendant an extension of time. Our refusal to grant

at this time the more extensive relief the Defendant requests in its Motion for a stay should allow the Defendant to seek whatever relief it chooses before the Court of Appeals. See Fed. R. App. P. 8(a)(2)(A)(ii).

For the convenience of all interested persons, the Court's Orders of April 23, 2003; March 30, 2005; and October 5, 2005, will be attached to this Order.

The Court hereby grants a 60-day extension of time for the parties to comply with the Court's October 5, 2005, Order. The required documents must be filed no later than January 2, 2006.

IT IS SO ORDERED.
/s/ Lawrence M. Baskir
Judge

Attachments

In the United States Court of Federal Claims
Case No. 00-737C
(Filed: October 5, 2005)

DAVID A. SCHOLL,
Plaintiff,
v.

THE UNITED STATES OF AMERICA,
Defendant.

ORDER

On July 12, 2005, the Plaintiff filed his Motion to compel the Defendant's answer to Interrogatory 1 (First Motion); and his Motion to impose evidentiary consequences on the Defendant, overrule the Defendant's objections to discovery, and compel answers to interrogatories (Second Motion). The Defendant filed its Combined Opposition to Plaintiff's discovery motions on August 25, 2005, which included a Renewed Motion for Certification of an Interlocutory Appeal. Plaintiff filed his Reply on September 19.

In their Joint Status Report (JSR), filed by the parties on August 19, 2005, the Plaintiff expressed his desire to proceed to trial once this discovery dispute has been resolved. The Defendant once again raised its argument that this case should be certified for interlocutory appeal.

I. Interlocutory Appeal

The last seven pages of Defendant's brief are dedicated to its Motion that this case be certified for interlocutory appeal, which this Court clearly rejected in its opinion of March 30, 2005.
In its Order of March 30, 2005, this Court denied the Defendant's Motion to Certify Interlocutory Appeal as to the issues of law presented in this Court's opinions in Scholl v. United States, 54 Fed. Cl. 640 (2002) (Scholl I), and Scholl v. United States, 61 Fed. Cl. 322 (2004) (Scholl II). The Order rejected Defendant's motion as untimely, and because it failed to satisfy the requirements for interlocutory appeal. A motion requesting an interlocutory appeal as respects a discovery ruling on privilege was, as a

minimum, not then ripe. Of course, either party is free to seek an interlocutory appeal as respects a discovery ruling once one is made.

The parties should also note that the Defendant's Motion violates the Court's Special Procedures Order, which has been amended since it was issued to the parties on September 11, 2000. Paragraph 8 of the Special Procedures Order, which was revised June 1, 2005 and has been filed concurrently with this Order, prohibits parties from making Motions in the text of legal memoranda.

The Defendant's Renewed Motion for Certification of an Interlocutory Appeal as to Scholl I and Scholl II, pages 13 to 19 of its Brief, is denied for reasons previously stated.

II. In Camera Review

In his Motions to compel discovery, the Plaintiff challenges the sufficiency of the Defendant's privilege log, and also requests that the Defendant be required to submit allegedly privileged documents for the Court's in camera review. **The Plaintiff's request is granted**. The privilege log does not contain sufficient information about the documents to allow the Court to come to a reasoned decision.

By Defendant's own admission, a privilege log should identify all withheld documents and "describe their general subject matter." Def. Brief at 5. However, Defendant's privilege log does not identify the general subject matter of many of the documents. **The Defendant is hereby ordered to resubmit**

its privilege log no later than November 1, 2005, identifying the general subject matter of documents 3-4, 6-7, 11-12, 14, 28-29, 31, 45-47, 49-50, and 52, based on the numbering system used in the Appendix to Plaintiff's Second Motion.

The Defendant is also ordered to submit to the Court, under seal, all of the documents in its privilege log no later than November 1, 2005. The Defendant shall number each document in accordance with the numbering system used by the Plaintiff in the Appendix to its Second Motion. The Plaintiff's Motion to overrule Defendant's claims of privilege is stayed until the Court can review the requested documents.

III. Protective Order

The Court is hereby issuing a Provisional Protective Order in the event it becomes advisable to protect the confidentiality of evidence in this case. The parties are directed to submit any proposed changes in the Order no later than October 15, 2005 after which time the Order will become final.

IV. Interrogatory 1: The Witness Lists

In his Motion to compel Interrogatory 1, the Plaintiff seeks the name and nature of the testimony of each witness the Defendant intends to call at trial. In response, the Defendant claims: 1) the Rules do not require such a disclosure this far in advance of

trial; 2) the decision-making process of the Third Circuit judges, the likely witnesses, is privileged; and 3) the Defendant is unable to identify trial witnesses without first knowing how the Plaintiff intends to prosecute his case. We address these arguments in turn.

First, regardless of the eventual trial date, the Court may order the Defendant to disclose its witness list. See RCFC 26(b)(1) ("For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action."). To the extent that the Court's prior orders setting forth the discovery schedule are not clear, the Court now holds that Interrogatory 1, seeking the name and nature of testimony of all witnesses the Defendant intends to call at trial, is timely.

Second, the Defendant attempts to assert a privilege to protect the list of witnesses it intends to call at trial. It defies logic and well-established legal principles, however, to allow the Defendant to claim a privilege that it later intends to waive by calling the very witnesses it seeks to protect.

Third, Defendant's argument that it cannot produce its witness list because of a lack of understanding of the nature of the Plaintiff's case is also without merit. The Plaintiff's Complaint clearly identifies two Counts - Count 1 alleges violations of the Due Process Clause of the Fifth Amendment, and Count 2 alleges violations of the Regulations governing reappointment of Bankruptcy judges. Throughout this litigation, the Plaintiff has made evident his theories with respect to these two counts.

Plaintiff's Motion to compel an answer to Interrogatory 1 is hereby granted as to Count 2. The Defendant is ordered to produce the name and nature of testimony of each witness it intends to call at trial in defending against Count 2. The Plaintiff is also directed to produce its list of witnesses as to Count 2 if not previously disclosed. The Plaintiff's Motion with respect to Count 1 is stayed pending the results of the Show Cause Order in the next section of this document.

V. Count 1 of the Complaint

To date, the Defendant has not moved to dismiss Count 1 of the Complaint for lack of jurisdiction. Of course, the issue may not be waived, and the Court may consider whether it has subject matter jurisdiction over a claim sua sponte. E.g., Fisher v. United States, 402 F.3d 1167, 1173 (Fed. Cir. 2005). If the statute, regulation, or Constitutional provision on which the claim is based is not money-mandating, then the Court must find that it lacks jurisdiction to hear the claim. Id. Because the Due Process Clause of the Fifth Amendment is not a money-mandating provision of the Constitution, see Mullenberg v. United States, 857 F.2d 770, 773 (Fed. Cir. 1988), the Court likely lacks jurisdiction to hear Count 1 of the Plaintiff's Complaint.

The Plaintiff is therefore ordered to show cause no later than **November 1, 2005 why Count 1 of his Complaint, based on the Due Process**

Clause of the Fifth Amendment, should not be dismissed for lack of subject matter jurisdiction. The Defendant may respond no later than November 30, and the Plaintiff's Reply is due December 14.

IT IS SO ORDERED.

/s/ Lawrence M. Baskir
Judge
In the United States Court of Federal Claims
Case No. 00-737C
(Filed: April 23, 2003)

DAVID A. SCHOLL,
Plaintiff,
v.

THE UNITED STATES OF AMERICA,
Defendant.

ORDER

This Order confirms the agreement reached by the parties in the Status Conference that the Court held in this matter on April 23, 2003.

I. Defendant's Motion to Dismiss

The Defendant filed its first Motion to Dismiss in December 2000, which the Court denied in a December 2002 Opinion. On March 31, 2003, the Defendant filed another Rule 12(b) Motion to Dismiss for Lack of Jurisdiction, raising a new issue with the Plaintiff's Complaint. Because the Court

requires the Defendant to raise all remaining Rule 12(b) defenses in one motion, **the Defendant's March 31st motion is hereby STRICKEN from the Record.**

The Defendant is permitted to file another Rule 12(b) Motion, but it must be the Defendant's final such motion and shall so state. **The Defendant's Renewed Motion to Dismiss shall be filed no later than May 26, 2003. The Plaintiff shall respond by June 27, 2003, and the Defendant's reply is due on July 11, 2003.**

II. Discovery

As discussed, the Court will not permit discovery to proceed in this case until after ruling on the Defendant's Renewed Motion to Dismiss. **The Plaintiff shall withdraw its discovery request at this time.** The parties may, of course, conduct informal document exchange. **Accordingly, the Defendant's April 17, 2003, Motion for Leave to File a Motion for Enlargement of Time in which to Respond to the Plaintiff's Discovery Request is DENIED as Moot**, as is the Defendant's underlying request for extension of time.

The parties shall filed a Joint Status Report thirty (30) days after the Court rules on the Defendant's motion. The JSR shall contain a detailed discovery plan in accordance with the requirements indicated at this status conference.

IT IS SO ORDERED.

DAVID A. SCHOLL, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.

No. 00-737C

UNITED STATES COURT OF FEDERAL CLAIMS

68 Fed. Cl. 58
March 30, 2005, Filed

LAWRENCE M. BASKIR, Judge.

[*59] ORDER AND OPINION

BASKIR, Judge.

On December 4, 2002, this Court denied the Defendant's motion to dismiss for failure to state a claim upon which relief may be granted. See Scholl v. United States, 54 Fed. Cl. 640 (2002) (Scholl I). We held that "Judge Scholl had a firm right - absent other factors which we will explore in further proceedings - to be reappointed as a U.S. Bankruptcy Judge for the Eastern District of Pennsylvania." Id. at 640-41. Defendant's counsel filed a motion for reconsideration three months later, on February 28, 2003. We denied the motion on March 24, 2003.

On May 27, 2003, Defendant's counsel filed a "renewed" motion to dismiss for lack of subject matter jurisdiction. In our opinion of June 23, 2004, we denied the Government's renewed motion. See Scholl v. United States, 61 Fed. Cl. 322 (2004) (Scholl II). In so doing, we found that Defendant's counsel

had not established that the enactment of the Civil Service Reform Act of 1978 (CSRA), Pub. L. 95-454, 92 Stat. 1111, foreclosed judicial review of Judge Scholl's claims. Id. at 322. We based our holding upon an examination of both the CSRA and the Bankruptcy Reform Act of 1978.

On October 20, 2004, almost two years after Scholl I and four months after the ruling in Scholl *II*, Defendant's counsel filed a Motion to Certify Interlocutory Appeal and to Stay Further Proceedings. The Plaintiff has opposed the motion. In his motion, Defendant's counsel asks that the Court amend both Scholl I and Scholl II to include the express findings required by 28 U.S.C. § 1292(d)(2) and to certify the orders for interlocutory appeal. He also requests that the Court stay all further proceedings pending final resolution of the interlocutory appeal. We denied the stay request in our order dated January 10, 2005.

Because we find that the Defendant's request is untimely with respect to both Scholl I and Scholl II and because the Defendant fails to satisfy other requirements for an interlocutory appeal, we hereby deny the Defendant's Motion to Certify Interlocutory Appeal.

Discussion

I. Timeliness

At the time we entered our opinions in Scholl I and Scholl II, neither was certified for interlocutory appeal under 28 U.S.C. § 1292(d)(2), nor did counsel

request such certification in his dispositive briefing or afterwards. Counsel now asks that we amend our opinions of December 17, 2002, Scholl I, and June 23, 2004, Scholl II, adding a section 1292(d) certification. 28 U.S.C. § 1292(d)(2), states, in relevant part:

> when any judge of the [United States Court of Federal Claims], in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

28 U.S.C. § 1292(d)(2) (emphasis added). The language of 28 U.S.C. § 1292(d)(2) is virtually identical to 28 U.S.C. § 1292(b), which governs interlocutory appeals in the United States District Courts. See United States v. Connolly, 716 F.2d 882, 885 (Fed. Cir. 1983). We may therefore look to the legislative history and case law of Section 1292(b).

The Plaintiff challenges the motion as untimely with respect to both of the Court's opinions. The statute governing interlocutory appeals does not set an explicit time limit within which a party must file a motion to certify. See 28 U.S.C. § 1292(d)(2). However, it does refer to an "immediate appeal" and it mandates that an application to appeal - following

a trial court's order that includes the trial judge's certification - must be filed in the circuit court within ten days after the entry of the order.

The statutory expectation that the appeal process will be implemented with dispatch should not be circumvented without [*60] reason. Accordingly, granting a motion to amend beyond the ten-day limitation period is only proper where there is a reason for the delay. See, e.g., Weir v. Propst, 915 F.2d 283, 287 (7th Cir. 1990); Ferraro v. Sec. of HHS, 780 F. Supp. 978, 979 (E.D.N.Y. 1992). Unreasonable delay constitutes sufficient cause to deny a motion and a judge "should not grant an inexcusably dilatory request." Richardson Elecs., Ltd. v. Panache Broad of Pa., Inc., 202 F.3d 957, 958 (7th Cir. 2000).

Defendant's counsel defends his motion as timely, citing the lengthy internal review process within the Department of Justice before the Acting Solicitor General authorized the motion. Def.'s Reply at 4. Apparently, scheduled vacations or "annual leave schedules" also interfered with counsel's ability to bring a prompt motion before the Court. Id. at fn.1. Defendant's counsel does not state at what point he determined to seek an appeal and he provides no time-line of events.

The Court is thus unable to determine to what extent the delay was actually due to the approval process, how much was attributable to time off for vacation, and how much can be attributed to counsel's inaction. Defendant's counsel cites no cases to support the proposition that the United States should be treated differently from private parties in

determinations of timeliness. At no point did counsel advise the Court that he had initiated the review process, much less did counsel seek leave of this Court to stay proceedings pending the completion of the Department of Justice's internal processes. Accordingly, we do not accept counsel's attempts to excuse his procrastination.

The Plaintiff cites numerous cases in which other courts have denied motions to certify where the motions were made from one month to five months after entry of the order sought to be appealed. See, e.g., Morton College Bd. of Trustees v. Town of Cicero, 25 F. Supp. 2d 882, 885 (N.D.Ill. 1989) (one month); Fabricant v. Sears Roebuck & Co., 2001 U.S. Dist. LEXIS 24518 (S.D. Fla.) (forty-six days); Weir, 915 F.2d at 283 (sixty-three days); Ferraro, 780 F. Supp. at 979 (two and a half months); In re Buspirone Patent Litigation, 210 F.R.D. 43, 50 (S.D.N.Y. 2002) (three months). In response, Defendant's counsel cites to three cases in this court where motions to certify were allowed several months after the issuance of a decision. See Marriott Int'l Resorts v. United States, 63 Fed. Cl. 144 (2004) (three months); American Mgmt. Sys. v. United States, 57 Fed. Cl. 275, 275-76 (2003) (two months); Vereda, LTDA v. United States, 46 Fed. Cl. 569, 569-70 (2000) (three months). Counsel's four month delay exceeds the time period in his cited cases.

In Marriott International, the defendant filed a motion to reconsider or stay the decision. The court denied the motion to reconsider but granted the motion to stay "'such that the government [might] make an orderly and considered decision whether or

file an interlocutory appeal or seek a writ of mandamus regarding this court's opinion and order.'" 63 Fed. Cl. 145, quoting August Order at 2. American Management and Vereda, LTDA did not address the timeliness question. Based on the precedent provided by the Defendant, four months is too long absent a prior request for stay. With respect to Scholl II, the motion is untimely.

The question is not even close with respect to Scholl I. The Defendant's argument for timeliness lies buried in a footnote:

> It would have been premature for the Government to seek interlocutory review of the 2002 order when the case still could have been terminated by this Court based upon our renewed motion to dismiss....It would be vastly inefficient for the Court to certify only its later ruling, and not its former, when a reversal of either would terminate the litigation.

Def.'s Reply at n.2.

Defendant's counsel is unable to cite a single case where a motion for interlocutory appeal was allowed after such a long delay or upon such flimsy grounds. Counsel's delay in seeking an interlocutory appeal from our opinions suggests that prompt resolution of this litigation is not on his agenda. Defendant's counsel chose to file his two motions seriatim, the second six months after the first was decided. It was thus even more incumbent upon him to seek the Court's [*61] leave for any delay of his motion to certify an interlocutory appeal. We deny

the Defendant's motion to certify Scholl I as untimely.

II. Standards for Certification

Whether to grant or deny a motion for certification of an interlocutory appeal lies largely in the discretion of the trial judge. See D'Ippolito v. Cities Service Co., 374 F.2d 643, 649 (2d Cir. 1967); Arthur Young & Co. v. United States Dist. Court, 549 F.2d 686, 698 (9th Cir. 1977). Section 1292(d)(2), quoted earlier, sets forth three substantive standards before the court certifies an interlocutory appeal. An issue of controlling law exists about which there is "substantial" difference of opinion, and the appeal will "materially advance the ultimate termination of the litigation." The Report of the Committee on Appeals from Interlocutory Orders of the District Courts elaborates on these factors:

> Your Committee is of the view that the appeal from interlocutory orders thus provided should and will be used only in exceptional cases where a decision of the appeal may avoid protracted and expensive litigation, as in antitrust and similar protracted cases, where a question which would be dispositive of the litigation is raised and there is serious doubt as to how it should be decided,....It is not thought that district judges would grant the certificate in ordinary litigation which could otherwise be promptly disposed of or that mere question as to the correctness of the ruling would prompt the granting of the certificate.

Northrop Corp., Northrop Elec. Sys. Div. v. United States, 27 Fed. Cl. 795, 798 (1993), citing Report of the Committee on Appeals from Interlocutory Orders of the District Courts, Sept. 23, 1953, reprinted in 1958 U.S.C.C.A.N., 85th Cong. 2d Sess., at 5260-61.

Interlocutory review should be reserved for "exceptional" cases: "Routine resort to § 1292(b) requests would hardly comport with Congress' design to reserve interlocutory review for 'exceptional' cases while generally retaining for the federal courts a firm final judgment rule." Caterpillar Inc. v. Lewis, 519 U.S. 61, 74, 136 L. Ed. 2d 437, 117 S. Ct. 467 (1996) (citing Coopers & Lybrand v. Livesay, 437 U.S. 463, 475, 57 L. Ed. 2d 351, 98 S. Ct. 2454 (1978), in turn quoting Fisons, Ltd. v. United States, 458 F.2d 1241, 1248 (7th Cir. 1972)). The legislative history, as well as the historic policy against such appeals, indicates that great restraint should be used in granting such appeals. See, e.g., Aleman Food Services, Inc. v. United States, 24 Cl. Ct. 345, 357 (1991).

"Controlling Question of Law"

The first criterion of Section 1292(d)(2) requires a "controlling question of law." The Defendant maintains that the jurisdictional issues addressed by Scholl II are "controlling issues of law" because reversal of that opinion would terminate the proceedings. Def.'s Motion at 4. Counsel's argument cuts too deeply. Successful appeals of denials of the Government's motions to dismiss under 12(b)(1) or (6) always result in termination of all or at least that part of Plaintiff's case. Something more is needed to

justify an interlocutory appeal of unsuccessful motions to dismiss.

What might set these dispositive motions apart is the controversial nature of the discovery their denials might suggest. Counsel maae much of that in his papers. But these fears are imaginary. As we set out in our order of January 10, 2005, Plaintiff's counsel had not previously sought such discovery, and later he completely disavowed any intention of doing so. Perhaps the appropriate juncture to seek an interlocutory appeal would be after a court order requiring such disclosures.

The more accurate test of whether Scholl I or ll presents a "controlling question of law" has been put forth by the Court of Claims: "questions of law have only been deemed 'controlling,' under this statute, if they materially affect issues remaining to be decided in the trial court." See, e.g., Brown v. United States, 3 Cl. Ct. 409, 411 (1983) (internal citations omitted); Coast Federal Bank, FSB v. United States, 49 Fed. Cl. 11 (2001); Marriott Int'l Resorts, 63 Fed. Cl. 144. Under this standard, Scholl I and ll likely present controlling questions of law.

[*62] "Substantial Ground for Difference of Opinion"

The second criterion of Section 1292(d)(2) requires a "substantial ground for difference of opinion." Defendant's counsel has failed to show that a "substantial" ground for difference exists, as respects either Scholl I or Scholl ll. The opinions he cites by the Ninth and Eleventh Circuit concern the

preclusive effect the enactment of the CSRA had upon Bivens actions. In Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, the Supreme Court held that a plaintiff could state a cause of action against a federal officer for constitutional violations occurring under the color of federal law. 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971). As we stated in our decision, Scholl II involves totally different considerations from Bivens actions.

The Defendant cites opinions by our sister circuits for the proposition that the Civil Service Reform Act (CSRA), as interpreted by the Supreme Court in United States v. Fausto, 484 U.S. 439, 443, 98 L. Ed. 2d 830, 108 S. Ct. 668 (1998), precludes challenges to adverse personnel decisions by judicial branch employees. See Lee v. Hughes, 145 F.3d 1272, 1274-1275 (11th Cir. 1998) (probation officer); Blankenship v. McDonald, 176 F.3d 1192, 1195 (9th Cir. 1999) (court reporter). Neither decision involved a bankruptcy judge. And consequently, neither court addressed our view that the Bankruptcy Reform Act of 1978, "a statutory scheme separate from the CSRA governs the appointment, reappointment, and removal of bankruptcy judges." Scholl II, 61 Fed. Cl. at 325. Instead, each cited decision addressed the availability of a Bivens action to a federal employee that was not afforded administrative or judicial remedies under the CSRA. The decisions by the Ninth and Eleventh Circuits offer authority on the question of whether the CSRA precludes the availability of other actions, including Bivens actions, for those employees under its purview, but those employees do not include bankruptcy judges.

As for Scholl I, our decision construed the language of *a provision to determine whether* the provision was mandatory. Not only was this exercise fairly unremarkable, but counsel's contribution was decidedly unhelpful.

Conclusion

The Defendant has failed to meet its burden of demonstrating that interlocutory appeal is warranted. Accordingly, its motion is denied.

IT IS SO ORDERED.

/s/ Lawrence M. Baskir

DAVID A. SCHOLL, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.

No. 00-737C

UNITED STATES COURT OF FEDERAL CLAIMS

61 Fed. Cl. 322; 2004 U.S. Claims LEXIS 182

June 23, 2004, Filed

LAWRENCE M. BASKIR, Judge.

OPINION: [*322] **BASKIR, Judge.**

On May 27, 2003, the Defendant filed a renewed Motion to Dismiss for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (RCFC). In its motion, the Defendant argues that the enactment of the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111 (CSRA), eliminated this Court's authority to hear a back pay claim from the Plaintiff, Bankruptcy Judge David Scholl, an officer of the Judicial Branch. Following the filing of the second motion to dismiss by the Government, we held a hearing and directed the parties to address a number of issues raised by that motion. **Because we find that the CSRA does not foreclose judicial review of Judge Scholl's claims we deny Defendant's renewed Motion to Dismiss.**

Introduction

In reaching a decision on Defendant's motion, we must accept the Plaintiff's allegations as true and draw all reasonable inferences in Plaintiff's favor. See, e.g., Henke v. United States, 60 F.3d 795, 797 (Fed. Cir. 1995) (citing Scheuer v. Rhodes, 416 U.S. 232, 236-7, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974)). A motion to dismiss for lack of subject matter jurisdiction may be filed at any time. See RCFC 12(h)(3); George W. Kane, Inc. v. United States, 26 Cl. Ct. 655, 658 (1992). But the Defendant's renewed motion came as a surprise as it was the second motion to dismiss filed by the Defendant in this action. We rejected Defendant's first motion to dismiss for failure to state a claim upon which relief could be granted in our opinion of December 4, 2002. See Scholl v. United States, 54 Fed. Cl. 640 (2002). We concluded that the Court has jurisdiction over the Plaintiff's back pay claim. Id. at 643-45.

[*323] Judge Scholl contends he was improperly denied his mandatory reappointment to a second 14-year term as a bankruptcy judge, in violation of statutory and regulatory provisions governing reappointment. He also challenges the validity of the procedures used in determining his reappointment, a somewhat more problematic claim which the parties and the Court have yet to address.

Discussion

Our earlier opinion discussed jurisdiction at length, but for the convenience of the reader we briefly revisit that subject. See also Scholl, 54 Fed. Cl. at 643-45. As a court of limited jurisdiction, this

Court may only hear claims brought against the Government to the extent that Congress has waived sovereign immunity. See, e.g., United States v. Sherwood, 312 U.S. 584, 586, 85 L. Ed. 1058, 61 S. Ct. 767 (1941). The Tucker Act, this Court's primary jurisdictional statute, states that a suit may be brought if it is:

> founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1). Because the Tucker Act standing alone does not create a substantive right of recovery for money damages a plaintiff must also demonstrate a separate, substantive right pursuant to a money mandating provision. See, e.g., United States v. Mitchell, 445 U.S. 535, 538, 63 L. Ed. 2d 607, 100 S. Ct. 1349 (1980); United States v. Testan, 424 U.S. 392, 47 L. Ed. 2d 114, 96 S. Ct. 948 (1976). The party asserting jurisdiction bears the burden of proof. See Rohmann v. United States, 25 Cl. Ct. 274, 277 (1992).

Historically, this Court's Tucker Act jurisdiction extended to Federal civilian pay claims because salary specifying statutes are considered money mandating provisions. See United States v. Fausto, 484 U.S. 439, 453-54, 98 L. Ed. 2d 830, 108 S. Ct. 668 (1988); United States v. Wickersham, 201 U.S. 390, 400, 50 L. Ed. 798, 26 S. Ct. 469, 41 Ct. Cl. 505 (1906). Plaintiff's monetary claim seeks his salary, both retroactively and prospectively. The

statute providing compensation for bankruptcy [*324] judges, 28 U.S.C. § 153, acts as the necessary money mandating provision and meets the "Act of Congress" prong of the Tucker Act. The Back Pay Act, 5 U.S.C. § 5596, affords this Court with the authority to award back pay for the period prior to the date of judgment. While we may not award pay for future years, a plaintiff may file successive back pay claims.

In our earlier opinion, we held that the then applicable statutes and regulations governing the appointment and reappointment of bankruptcy judges gave Judge Scholl an absolute right to reappointment, subject to a condition subsequent - that he had "failed to perform the duties of a bankruptcy judge according to the high standards of performance regularly met by United States bankruptcy judges." Scholl, 54 Fed. Cl. at 644-51. We thus rejected the Government's thesis that United States v. Testan, 424 U.S. 392, 47 L. Ed. 2d 114, 96 S. Ct. 948 (1976), barred this action. Id.

In its new motion, the Government argues that the enactment of the CSRA eliminated this Court's authority to hear Judge Scholl's back pay claim. Def.'s Brief (May 27, 2003) at 4-5. The CRSA covers the civil service, which includes judicial appointees such as Judge Scholl. See 5 U.S.C. § 2101. The Defendant's position relies upon the Supreme Court's decision in United States v. Fausto, 484 U.S. 439, 98 L. Ed. 2d 830, 108 S. Ct. 668 (1988). The Government argues that Fausto's holding extends to personnel of the Judicial Branch just as it does to personnel of the Executive Branch.

We are not prepared to accept so sweeping a proposition without seeing whether the analysis the Supreme Court applied leads to the same conclusion as respects Judicial Branch personnel. Fausto held that the CSRA precluded Mr. Fausto, a nonpreference employee in the excepted service, from seeking judicial review for an adverse personnel decision. Id. The issue presented by Fausto for our case is whether the CSRA established so comprehensive a scheme for the review of adverse personnel actions for judicial officers, such as Judge Scholl, as to preclude jurisdiction in this Court under the statute providing compensation for bankruptcy judges, 28 U.S.C. § 153, and the Back Pay Act, 5 U.S.C. § 5596.

The Supreme Court in Fausto had to determine whether the absence of a judicial review provision for nonpreference eligible employees in the excepted service reflected a deliberate legislative decision to preclude review, or whether its silence left in place prior review rights. The Court examined "the purpose of the CSRA, the entirety of its text, and the structure of review that it established." Fausto, 484 U.S. at 444.

Quite obviously this analysis and the resulting conclusion as respects nonpreference eligible employees in the excepted service tells us nothing directly about the CSRA's application to Judicial Branch personnel in general or Article I judicial officers in particular. To answer that question we must apply the same methodology the Court employed in Fausto. We also look to the Bankruptcy

Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549, a statute enacted close in time to the CSRA and specifically dealing with bankruptcy judges. We conclude that the CSRA did not divest judicial review of Judge Scholl's action. We discern no legislative intent in the Act to cover adverse personnel actions such as his.

The Supreme Court described the CSRA, its purpose, and its historical and legal contexts. Enacted in 1978, the CSRA "comprehensively overhauled the civil service system." Lindahl v. OPM, 470 U.S. 768, 773, 84 L. Ed. 2d 674, 105 S. Ct. 1620 (1985). It replaced the "outdated patchwork of statutes and rules built up over almost a century" that was the civil service. Fausto, 484 U.S. at 444, citing S. Rep. No. 95-969, p. 3 (1978). Under the pre-existing system only veterans enjoyed a statutory right to appeal adverse personnel actions; other employees were either denied the right to an appeal or had the right by Executive Order. Id. "Appeals processes [were] so lengthy and complicated that managers [in the civil service] often avoided taking disciplinary action" against employees even when clearly warranted. Id. at 445, citing S. Rep. No. 95-969, at 9.

Judicial review of adverse personnel actions varied as well. Because there was no special statutory review proceeding relevant to personnel action, employees resorted to a variety of judicial theories, including suits for mandamus and injunction. Fausto, 484 U.S. at 444. On many matters concurrent jurisdiction existed between the district courts and the Court of Claims. Id. at 445.

Dissatisfaction existed with the "wide variations in the kinds of decisions...issued on the same or similar matters." Id., citing S. Rep. No. 95-969, at 63.

But the civil service system was not alone in receiving Congress' attention in 1978. After almost ten years of study and investigation, Congress undertook a significant revision of the bankruptcy laws. See generally Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 73 L. Ed. 2d 598, 102 S. Ct. 2858 (1982)(discussing the bankruptcy system both prior to and subsequent to the revisions). Making its way through Congress at approximately the same time as the CSRA, the Bankruptcy Reform Act of 1978 created the current bankruptcy court system. It was enacted on November 6, 1978, twenty-four days after the enactment of the CSRA on October 13, 1978, and became effective on October 1, 1979. The Bankruptcy Reform Act's broad grant of judicial power was later found in violation of Article III of the Constitution. See Northern Pipeline Construction Co., 458 U.S. at 57-87. We look to the Bankruptcy Reform Act because its provisions dealt more specifically with bankruptcy judges. It offers illumination on the question of whether Congress intended to foreclose Judge Scholl's right to judicial review through its enactment of the CSRA.

First we consider the text of the CSRA. In order to find that Judge Scholl's right to judicial review was divested by the CSRA we must find that the CSRA created a comprehensive system of review for adverse personnel actions involving judicial officers. In Fausto, the Court found that in each of

the [*325] three main sections of the CSRA that govern personnel action taken against members of the civil service Congress dealt "explicitly" with the situation of employees of Mr. Fausto's status, nonpreference members of the excepted service, "granting them limited, and in some cases conditional rights." Fausto, 484 U.S. at 445.

The Defendant concedes that employees of the Judicial Branch, including Judge Scholl, while part of the civil service, are not covered by the adverse personnel action provisions of the CSRA. Def.'s Brief (Jan. 20, 2004) at 3-4. Several provisions of the CSRA support this point. See 5 U.S.C. §§ 2302(a)(2)(C), 4301(1) (definition of "agency" does not include courts); id. at §§ 7501, 7511(a) (definition of "employee" does not encompass excepted service employees such as court employees); see also Hartman v. MSPB, 77 F.3d 1378, 1379-80 (Fed. Cir. 1996) (district court deputy clerk not an "employee" as defined in 5 U.S.C. § 7511(a)(1)). In contrast, Mr. Fausto was an employee of an agency within the meaning of the CSRA. See 5 U.S.C. §§ 2302(a)(2)(C), 4301(1)(A).

The Bankruptcy Reform Act did not amend the CSRA to include bankruptcy judges in any comprehensive and integrated scheme for review of personnel matters, such as that discussed by the Court in Fausto. The five sections of the CSRA that were amended by the Bankruptcy Reform Act of 1978 each had to do with financial matters. Three of the amended sections related to annuities: 5 U.S.C. §§ 8339, 8341, and 8344(a)(4)(A). The other two related to civil service retirement, 5 U.S.C. §§ 8331, 8334(c).

The term "bankruptcy judges" was inserted into 5 U.S.C. § 8331, the definitional section for purposes of civil service retirement. The other section, 5 U.S.C. § 8334(c), related to deductions, contributions, and deposits required to be withheld from the pay of an employee for credit to the civil service retirement fund. At most we could find the acts intersected to the extent that the Bankruptcy Reform Act amended the CSRA only to include bankruptcy judges in its annuity and retirement coverage.

The Defendant's inability to prove that judicial officers fall within the comprehensive scheme governing personnel actions contained within the CSRA is fatal to its argument. Judge Scholl does not have the right, under the CSRA, to appeal his non-appointment to the Merit Systems Protection Board (Board). As a bankruptcy judge, he does not fall within the categories of employees covered by the adverse personnel actions of the CSRA, nor is his claim of the sort the Board has subject matter jurisdiction over. The Federal Circuit has interpreted Fausto only to preclude this Court from exercising jurisdiction under the Back Pay Act where the CSRA "gave the Board jurisdiction over a claim involving a specified subject matter or category of employee." Read v. United States, 254 F.3d 1064, 1067 (Fed. Cir. 2001); see also Worthington v. United States, 168 F.3d 24, 25 (Fed. Cir. 1999). Neither of these disqualifications is present as respects Judge Scholl's situation.

A statutory scheme separate from the CSRA governs the appointment, reappointment, and removal of bankruptcy judges. The Bankruptcy

Reform Act of 1978 created a system of bankruptcy courts and judges. It also governed the removal of those judges, inserting 28 U.S.C. § 153, which reads in relevant part "(b) removal of a bankruptcy judge during the term for which he is appointed shall be only for incompetency, misconduct, neglect of duty, or physical or mental disability."

In light of this structure we cannot glean from the CSRA the congressional intent to deny bankruptcy judges the judicial remedies in adverse personnel matters they would have had before the enactment of the CSRA. In reaching this decision, we adhere to a well-established principle of statutory construction - that for laws that prohibit certain actions, additional prohibitions should not be implied absent specific legislative intent. See Bosco v. United States, 976 F.2d 710, 713 n7 (Fed. Cir. 1992). We properly look to the more particularized statute governing bankruptcy judges in reaching our conclusion.

Our review of the Bankruptcy Reform Act and the CSRA illustrates that bankruptcy judges were, and are, subject to a separate statutory and administrative scheme for reappointment and removal. Because we [*326] find that the CSRA was not meant to foreclose judicial review of Judge Scholl's claims - the thesis of the second Government motion to dismiss - we do not repeat our previous discussion of later legislative enactments dealing with bankruptcy judges. See Scholl, 54 Fed. Cl. 640.

Conclusion

The enactment of the CSRA did not foreclose Judge Scholl's right to bring this action. We thus deny the Defendant's renewed Motion to Dismiss. The parties are to submit a Joint Status Report no later than July 22, 2004, proposing a schedule for further proceedings in this matter, particularly discovery.

IT IS SO ORDERED.

LAWRENCE M. BASKIR, Judge

DAVID A. SCHOLL, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.

No. 00-737C

UNITED STATES COURT OF FEDERAL CLAIMS

54 Fed. Cl. 640; 2002 U.S. Claims LEXIS 333
December 4, 2002, Filed

LAWRENCE M. BASKIR, Judge.

[*640] OPINION n1

n1 This is a corrected version of the Opinion issued on December 4, 2002. Note the minor corrections on Pages 3 and 4, as indicated in bold-faced font. We apologize to Ms. Slawsky for the Court's error with her name.

BASKIR, Judge.

Pending before the Court in this civilian back pay case, filed by U.S. Bankruptcy Judge David A. Scholl in 2000, is the Defendant's motion to dismiss for failure to state a claim upon which this Court may grant relief. Because we hold that Judge Scholl had a [*641] firm right - absent other factors which we will explore in further proceedings - to be reappointed as a U.S. Bankruptcy Court Judge for the Eastern District of Pennsylvania, **the Plaintiff's complaint is properly before this Court. Thus,**

for the reasons stated below, the Defendant's motion to dismiss is DENIED.

I. Background

A. Judge Scholl's Application for Reappointment

Before discussing the issues raised by the Government's motion, we set forth as background the events surrounding Judge Scholl's application for reappointment. While this background is of limited relevance to the disposition of the pending motion, it does provide context to the dispute. None of the facts below are contested.

Pursuant to 28 U.S.C. § 152(a) (1984), the U.S. Court of Appeals for the Third Circuit (Third Circuit) appointed David A. Scholl to a 14-year term as a U.S. Bankruptcy Judge for the Eastern District of Pennsylvania on August 27, 1986. From 1994 to 1999, Judge Scholl served as Chief Bankruptcy Judge. Bankruptcy judges serve on a full-time basis, and for the duration of his term, Judge Scholl, like all bankruptcy judges, was paid an annual salary at a rate of 92% of the salary of U.S. District Court judges. See 28 U.S.C. § 153.

In August of the thirteenth year of the Judge's term, Mr. Francis F. Szczebak, the Chief of the Bankruptcy Judges Division of the Administrative Office of the United States Courts (AO), notified Judge Scholl and Third Circuit Chief Judge Edward R. Becker that Judge Scholl's term was nearing its end. The AO's letter informed Chief Judge Becker

that the self-described "regulations" of the Judicial Conference of the United States (JCUS) provide procedures for the reappointment, in the event the incumbent judge is interested, or, in the event that he or she is not, for the selection and appointment of a new bankruptcy judge. The AO's letter also contained a document entitled the "Timeline for Reappointment Process," which is attached to this Opinion in Appendix A. We discuss these regulations in greater detail below.

In response to the AO's letter, and in compliance with the regulations, on December 29, 1999, Judge Scholl timely notified Chief Judge Becker of his "willingness" and desire to be reappointed for a second term as a bankruptcy judge. Judge Scholl also enclosed his executed AO application form (Form "PER 74") with the letter.

Sometime prior to March 1, 2000, and still pursuant to the regulations, the active judges of the Third Circuit conducted a preliminary vote to determine whether or not to proceed with the reappointment process. By a memorandum dated March 1, 2000, Chief Judge Becker informed all active Third Circuit judges that the Court had initially approved Judge Scholl's application and would go forward with the required "public comment period" concerning his reappointment. Judge Scholl does not take issue with the processing of his application to this point.

On March 2, 2000, the first public notice was sent to area newspapers and periodicals; bar associations; libraries; Third Circuit district,

magistrate, and bankruptcy judges; and posted on the AO's and Third Circuit's internet websites. The March 2nd notice stated, in part, that:

> The United States Court of Appeals for the Third Circuit is considering the reappointment of Judge Scholl to a new term of office and has determined that he appears to merit reappointment subject to public notice and opportunity for public comment.

Public Notice for Reappointment of a Bankruptcy Judge, Mar. 2, 2000 (emphasis added).

The public comment period, which by JCUS regulation may not exceed 45 days, was set to expire on April 14, 2000.

Despite this apparently wide distribution, the Notice did not appear in the local newspaper of greatest circulation, The Philadelphia Inquirer, nor was it published in The Legal Intelligencer, the daily legal newspaper published for the bench and bar in the Philadelphia area.

Shortly before the close of the public comment period, on April 6, 2000, the judges of the Third Circuit adopted and issued their [*642] own regulations to supplement those adopted by the JCUS. In addition to seeking comments from the public, the Third Circuit now required that the Third Circuit Executive send out a detailed questionnaire to attorneys who appeared before the candidate judge during the three years prior to the end of the judge's term. The Circuit Executive, Ms. Toby D.

Slawsky, requested that the Clerk of the Bankruptcy Court compile a list of all attorneys who met this criterion. It is at this stage that Judge Scholl begins to take issue with the processing of his application.

The technology of the Eastern District Bankruptcy Court was no match, however, for the Third Circuit's "questionnaire" regulation. The Bankruptcy Court's Clerk's Office apparently could not segregate those attorneys' names nor produce such a specified list. Therefore, on April 11, 2002, Ms. Slawsky suggested, and Chief Judge Becker concurred, that the Third Circuit send the questionnaire to the 500 members of the Third Circuit Bankruptcy Conference and to a more focused list of attorneys and non-attorney litigants who had appeared only in specific proceedings, such as Chapter 11 and Chapter 13 cases.

Accordingly, on two dates, April 6 and sometime after April 12, the Third Circuit circulated a questionnaire containing 35 detailed questions to approximately 1,165 individuals. For 24 of the questions, the respondent was asked to rate Judge Scholl on a scale of 0-5. Eleven additional questions required the respondent to provide an overall evaluation of the candidate and to rate his or her experience before the Judge. There was also a provision for narrative comments. The Third Circuit extended the public comment period 21 days past the original deadline prescribed by the JCUS.

The public comment period concluded on May 5, 2000. Only 278 individuals submitted completed questionnaires. Ms. Slawsky tabulated the number of

responses in the various categories as well as ranked the percentages of the marks in those categories. Ms. Slawsky did not provide Judge Scholl with copies of the actual questionnaires. According to Judge Scholl, he received from Ms. Slawsky the summary "chart reflecting answers from 278 respondents..., 316 comments, and a covering letter" on Thursday afternoon, May 11, 2002. Pursuant to the Third Circuit's supplemental regulations, he was given an opportunity to respond to the public's "negative comments."

Four days later, Judge Scholl submitted a detailed, ten-page response letter on May 15, 2000, the due date. His response discussed his tenure and service as a bankruptcy judge, addressed the procedures used by the Third Circuit in seeking public comment, and responded to, by Judge Scholl's calculation, the 54 "negative" comments, approximately 4% of the questionnaires distributed.

In reply, Chief Judge Becker informed Judge Scholl on May 19, 2000, that the Court had received Judge Scholl's response and that pursuant to JCUS regulation, an active Third Circuit judge had requested that the Court of Appeals conduct a second vote on Judge Scholl's reappointment. The vote occurred on May 24, 2000, and its outcome was not favorable. Chief Judge Becker informed Judge Scholl by telephone that the Third Circuit had refused to reappoint him, and confirmed this result by letter dated May 25, 2000. The Chief Judge offered no formal or even informal explanation for the Court's adverse decision.

B. Procedural History

Not satisfied with this outcome or with the procedures used by the Third Circuit, Judge Scholl requested that Chief Judge Becker conduct a hearing "where [Judge Scholl] can be informed of the reasons for his non-retention and challenge their sufficiency." Letter from Judge Scholl's attorneys Cletus P. Lyman and Kenneth A. Jacobsen to Chief Judge Edward R. Becker, dated June 28, 2000 (citing Perry v. Sindermann, 408 U.S. 593, 603, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972)). In addition, Judge Scholl's attorneys sent a letter to the AO's General Counsel's Office.

On behalf of the Third Circuit, and in response to the letter sent to the General Counsel's Office, Mr. William R. Burchill, Jr., the Associate Director and General Counsel of the AO, notified Judge Scholl's attorneys [*643] on July 14, 2000, that the Judge's request for a hearing had been denied and that his term would end as previously scheduled in August of 2000. Several further communications ensued between Judge Scholl and the AO regarding the Judge's belief that procedural flaws affected his reappointment process. In the AO's final letter, Mr. Burchill stated:

> I should reiterate that the Court of Appeals has taken final action and this matter must therefore be considered closed.

Letter from Mr. Burchill to Messrs. Lyman and Jacobsen, July 28, 2000.

Prior to the end of his term, Judge Scholl filed suit in this Court (case number 00-506C), asserting that he had a firm right of reappointment, and seeking restoration and reappointment to his office. In December of 2000, after his first term had ended, and in response to informal objections by the Department of Justice that his complaint was premature, Judge Scholl voluntarily dismissed that suit. His term having now expired, he immediately filed the instant case with a similar complaint, again seeking restoration to office and his statutorily entitled pay for the second term. In addition, Judge Scholl asserts that his Constitutional rights to due process were violated, and that the Third Circuit failed to follow proper administrative procedure in the reappointment process. The Defendant's pending motion to dismiss for failure to state a claim upon which relief may be granted was filed, briefed, and argued in due course.

II. Discussion

It is appropriate to grant a motion to dismiss under Rule 12(b)(4) (now Rule 12(b)(6) under the Court's May 2002 revised rules) for failure to state a claim upon which relief may be granted when the facts asserted by the claimant do not under the law entitle him to a remedy. See New Valley Corp. v. United States, 119 F.3d 1576, 1579 (Fed. Cir. 1997). In reviewing the Defendant's motion, we are mindful that we must "assume that all well-pled factual allegations are true" and make all reasonable inferences in favor of Judge Scholl, the nonmovant. Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States, 48 F.3d 1166, 1169-70 (Fed. Cir.

1995). The Court may not dismiss Judge Scholl's complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). For the purposes of resolving this motion, as noted above, the facts and factual inferences are not in dispute and thus resolution hinges on a purely legal question of regulatory interpretation.

A. Subject Matter Jurisdiction

The U.S. Court of Federal Claims is a "court of special and, therefore, limited jurisdiction." Blazavich v. United States, 29 Fed. Cl. 371, 373 (1993). We may only hear suits against the Government and then only to the extent that Congress has by statute waived sovereign immunity. See United States v. Sherwood, 312 U.S. 584, 586, 85 L. Ed. 1058, 61 S. Ct. 767 (1941). This Court's primary jurisdictional statute states that a suit may only be brought if it is:

> founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. 28 U.S.C. § 1491(a)(1)(1994).

Known as the Tucker Act, this provision merely provides a waiver of sovereign immunity, and does not, standing alone, create any substantive right of recovery for money damages. To bring an

action against the United States, a Plaintiff must also demonstrate a separate substantive right pursuant to a money mandating provision. See United States v. Mitchell, 445 U.S. 535, 538, 63 L. Ed. 2d 607, 100 S. Ct. 1349 (1980); United States v. Testan, 424 U.S. 392, 47 L. Ed. 2d 114, 96 S. Ct. 948 (1976). Finally, the burden of establishing jurisdiction falls upon the party asserting jurisdiction. See Rohmann v. United States, 25 Cl. Ct. 274, 277 (1992).

Historically, the Court's Tucker Act jurisdiction extended to Federal civilian pay claims because the Supreme Court has held that statutes which specify a salary to be paid to individuals for their personal services [*644] are considered to be money mandating provisions. See United States v. Fausto, 484 U.S. 439, 453-54, 98 L. Ed. 2d 830, 108 S. Ct. 668 (1988) and United States v. Wickersham, 201 U.S. 390, 400, 50 L. Ed. 798, 26 S. Ct. 469, 41 Ct. Cl. 505 (1906). As my colleague Senior Judge James F. Merow has stated:

> The theory of recovery [is] that in cases of improper discharge, an employee's dismissal [is] void due to the government's improper behavior and therefore plaintiff [is] entitled to the pay provided pursuant to the statute.

Khan v. United States, 1998 U.S. Claims LEXIS 332, *14 aff'd,201 F.3d 1375 (Fed. Cir. 2000).

While Congress altered this jurisdictional mandate with the passage of the Civil Service Reform Act in 1978, Pub. L. 95-454, 92 Stat. 1111

(CSRA), with respect to civilian employees of the Executive Branch, the parties have not suggested that this act is a bar to jurisdiction in this case, a back pay claim from an officer of the Judicial Branch. See, e.g., Hatter v. United States, 38 Fed. Cl. 166 (1997), rev'd in part, 203 F.3d 795 (Fed. Cir. 2000), aff'd in part, rev'd in part, 532 U.S. 557, 149 L. Ed. 2d 820, 121 S. Ct. 1782 (2001).

Although Judge Scholl's complaint asserts procedural and Constitutional violations, these are jurisdictional grounds for actions in District Court. As respects this Court's jurisdiction, the Plaintiff asserts that he was improperly denied a second term in contravention of the JCUS reappointment regulations, and thus that the Court has the authority to grant monetary relief pursuant to the statute providing compensation for bankruptcy judges, 28 U.S.C. § 153. Judge Scholl's claim for his salary is both retroactive and prospective. The Back Pay Act, 5 U.S.C. § 5596 (1994), applies to employees of the Federal court system, and affords this Court the authority to award back pay for the period prior to the date of judgment, if this Court finds that the Plaintiff was improperly denied his salary. While technically the Court cannot order prospective pay, a plaintiff can always file successive back pay claims for the future years.

The Defendant argues in response that this Court cannot grant the monetary relief claimed because the Court cannot appoint Mr. Scholl to the bankruptcy court, and therefore argues that the Plaintiff's claim is barred by Testan. 424 U.S. at 392. In Testan, two Government attorneys filed suit in

the U.S. Court of Federal Claims, seeking to reclassify their positions to a higher grade on the Federal pay scale. In dismissing the attorney's claims, the Supreme Court stated:

> The present action . . . is not one concerning a wrongful discharge or a wrongful suspension. In that situation . . . the employee is entitled to the emoluments of his position until he has been legally disqualified... There is no claim here that either [claimant] has been denied the benefit of the position to which he was appointed. The claim, instead, is that each has been denied the benefit of a position to which he should have been, but was not, appointed. The established rule is that one is not entitled to the benefit of a position until he [or she] has been duly appointed to it. Id. at 402 (citations omitted)...

Here, however, the Plaintiff is not seeking the benefit of a position to which he wasn't appointed. Unlike Testan, this case is about whether or not Judge Scholl, as the incumbent officeholder, had a firm right to be reappointed to his position as a bankruptcy judge. The Defendant agreed at oral argument that if Judge Scholl had such a right, then he is statutorily entitled to compensation. Testen, therefore, is not dispositive.

Thus, we must interpret the language of the JCUS regulations and determine if they vested a reappointment right in the incumbent judge. In doing so, we are guided by other courts which have interpreted similar language. It is also helpful to

analyze the administrative context surrounding these regulations.

B. Textual Interpretation

We begin our analysis of the regulations' text with a short introduction to its history and legislative context. We will expand on this context in more detail below.

While the bankruptcy court system is over 20 years old, the regulations under which [*645] Judge Scholl applied for reappointment arise out of Section 303 of the Federal Courts Improvement Act of 1996 (FCIA), Pub. L. 104-317, 110 Stat. 3847, 3852. Section 303 expresses a clear Congressional preference for judicial continuity and reads in pertinent part:

> When filling vacancies, the court of appeals may consider reappointing incumbent bankruptcy judges under procedures prescribed by regulations issued by the Judicial Conference of the United States.

It is not surprising that Congress would vest such responsibility in the Judicial Conference. The JCUS dates to 1922, when Congress "charged a body of judges (eventually called the Judicial Conference of the United States) to make policy for the federal judiciary." JUDITH RESNIK, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III,113 HARV. L. REV. 924, 937-38 (2000). The "Conference's governance power was bolstered in 1939, when the creation of the Administrative Office

provided [it] with a support staff within the judiciary rather than the executive branch." RUSSELL R. WHEELER, ORIGINS OF THE ELEMENTS OF FEDERAL COURT GOVERNANCE 15 (1992) (noting that "current statutes vest many specific federal court governance duties" in the AO's director).

The JCUS and AO responded to Section 303 of the FCIA by amending previously promulgated regulations for the selection, appointment, and reappointment of bankruptcy judges. In fact, the March, 1997 amendments, which are the operative regulations at issue here, were the fifth version since the JCUS first promulgated them in 1984. See Regulations of the Judicial Conference for the Selection, Appointment, and Reappointment of United States Bankruptcy Judges, reprinted in THE SELECTION, APPOINTMENT, AND REAPPOINTMENT OF UNITED STATES BANKRUPTCY JUDGES, Judges Information Series No. 3, AO Office of Judges Programs (May 1998) ("Regulations" or "JCUS Regulations"). Interestingly, since this lawsuit was filed, there have been two more amendments to the reappointment regulations. See Regulations, Amendments of Sept. 2000 and Mar. 2001. This makes a total of 7 revisions in 17 years, or approximately 1 every 2 years on average. We understand that regulation drafting is a difficult and inexact art and draw no inference from this regulatory inconstancy.

The March 1997 chapter dealing with the reappointment process reads:

> The court of appeals will decide whether or not to reappoint the incumbent judges. In making the decision, the court of appeals shall take into consideration the professional and career status of the incumbent. Reappointment should not be denied unless the incumbent has failed to perform the duties of a bankruptcy judge according to the high standards of performance regularly met by United States bankruptcy judges.

Regulations, § 5.01(b) Methods, as amended, Mar. 1997 (emphasis added).

The remainder of the regulations outline the process the Circuit is to follow: the initial vote of the court; the public comment process; and the opportunity for an active judge to request a second vote of the appeals court. Individual circuits are allowed to supplement these regulations with their own implementing procedures, as the Third Circuit did. If a second vote is not requested, the regulations state that:

> After due consideration of the comments from the bar and public, the court of appeals shall reappoint such incumbent bankruptcy judge.

Id. at § 5.03(a) Decision of the Court of Appeals (emphasis added).

It is no reflection to observe that this language is less than clear - there have been, as we observed, two later revisions, which we visit towards the end of this Opinion. However, we are constrained to give

the actual "words used" by the Judicial Conference their "ordinary meaning." Moskal v. United States, 498 U.S. 103, 108, 112 L. Ed. 2d 449, 111 S. Ct. 461 (1990) (citations omitted).

The key question is whether the phrase "should not be denied unless" is a mandatory requirement or simply a suggestion, what in legal nomenclature is described as non-mandatory or "directory." The U.S. Court of Appeals for the Federal Circuit has discussed [*646] how to make this determination, and what consequences flow from it:

> When a provision in a statute instructs a governmental official in the exercise of an official duty, whether the statutory provision is directory or mandatory depends on several factors, which in turn govern the consequences of lapse by the official.
>
> Generally put, mandatory provisions are essential to the substance of the law to which they relate...
>
> The converse characterizes directory provisions: lack of strict compliance does not injure any substantive right, and the underlying proceeding is not invalidated by lack of compliance.

Exxon Chem. Patents, Inc. v. Lubrizol Corp., 935 F.2d 1263, 1267-68 (Fed. Cir. 1991) (Newman, J., concurring) (citing C. D. SANDS, SUTHERLAND STAT. CONSTR., Ch. 57 (4th ed. 1973)).

This is not a mere exercise in linguistics. "Legal rights flow from mandatory, not directory, requirements" and "mandatory regulations... 'have the force and effect of law.'" New England Tank Indus. v. United States, 861 F.2d 685, 694 (Fed. Cir. 1988) (citing Nordstrom v. United States, 342 F.2d 55, 169 Ct. Cl. 632, 638 (1965) and quoting Accardi v. Shaughnessy, 347 U.S. 260, 265, 98 L. Ed. 681, 74 S. Ct. 499 (1954)). The Supreme Court has stated that where the legislature or agency uses "language of an unmistakably mandatory character," then it "has created a protected liberty interest." Hewitt v. Helms, 459 U.S. 460, 471-72, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1982).

Thus, if this language is mandatory, then the regulations vested in Judge Scholl a firm right to be reappointed, and he may seek back pay, unless and until the Third Circuit fulfilled the condition subsequent - that he had "failed to perform the duties of a bankruptcy judge according to the high standards of performance regularly met by United States bankruptcy judges." On the other hand, if the language is directory, or permissive, then the judges of the Third Circuit had discretion to reappoint or not reappoint the incumbent judge, and Judge Scholl has no right to the position and its pay.

We must, therefore, as an initial matter explore the meaning of the word "should." It is an exercise that Humpty Dumpty would glory in.

Taken by itself, the word "should" has several different meanings. First, it is the past tense of "shall." AMERICAN HERITAGE DICTIONARY 1262

(3rd ed. 1997). Second, it is used to "express obligation or duty." Id. The third definition, and probably the most common usage, is that it is used to "moderate the directness or bluntness of a statement." Id.; see also WEBSTER'S NEW INTERNATIONAL DICTIONARY 2104 (3rd ed. 1993). Finally, it can be used to say that one "ought to" do something. FOWLER'S NEW MODERN ENGLISH USAGE 711 (3rd ed. 1996). In contrast, the word "shall" is commonly used "to express a command or exhortation" that is "mandatory." WEBSTER'S at 2085.

Since these dictionary definitions are divided between at least two incompatible meanings, we look to judicial authority for guidance. Help, unfortunately, does not come from that quarter either. Courts have long differed over whether "should," as used in a legislative or regulatory environment, is mandatory or directory.

For example, many courts have analyzed this question in connection with the guidelines for prison sentences issued by the U.S. Sentencing Commission. The Sentencing Guidelines for defendants who commit a felony while on probation or parole, and who have that supervised release revoked, state that "the sentence from the instant offense should be imposed to run consecutively to the term imposed for the violation of probation" or parole. U.S.S.G. § 5G1.3, n. 6 (emphasis added); see also United States v. Rosario, 134 F. Supp. 2d 661, 666 (E.D. Pa. 2001).

The Circuit Courts, in reviewing District Court decisions on this particular guideline, are deeply divided as to whether or not the sentencing judge has discretion to impose a concurrent, as opposed to a consecutive, sentence. The First, Fifth, Eighth, and Ninth Circuits have all held that "should" is mandatory, and that the judge has no discretion to depart from consecutive sentencing. See United States v. Gondek, 65 F.3d 1, 2-3 (1st Cir. 1995); United States v. Alexander, 100 F.3d 24, 26-27 [*647] (5th Cir. 1996); United States v. Goldman, 228 F.3d 942, 944 (8th Cir. 2000); and United States v. Bernard, 48 F.3d 427, 431 (9th Cir. 1995).

On the other hand, the Second, Seventh, and Tenth Circuits have held that the Guidelines are merely suggestive, and that a judge may impose either consecutive or concurrent sentences. See United States v. Maria, 186 F.3d 65, 70-73 (2d Cir. 1999); United States v. Walker, 98 F.3d 944, 945 (7th Cir. 1996) (noting, however, that a strong presumption exists in favor of consecutive sentencing); and United States v. Carver, 160 F.3d 1266, 1268, n.1 (10th Cir. 1998). Interestingly, in at least one of the cases, the United States took the position that "should" was mandatory language and "argued at oral argument that every use of 'should' in the Guidelines means 'shall.'" Maria, 186 F.3d at 70. The Government is not "estopped" from advancing a different argument in this Court, and we are, of course, reviewing a different regulation.

While the Federal Circuit has obviously not spoken to the issue of these prison sentences, it has weighed in on how it views the word "should." In one

of its opinions discussing the differences between mandatory and directory language, the Federal Circuit off-handedly noted that the regulation it was analyzing "employ[ed] mandatory terms such as 'will not' and 'will' rather than directory terms such as 'should.'" New England Tank, 861 F.3d at 694.

Two final points should (sic) be kept in mind. First, as every law student learns, "may" is almost always, but not invariably, discretionary, while "shall" is sometimes discretionary and sometimes mandatory - and predicting which will be the ultimate meaning in any particular case is never easy. Second, as every veteran, husband, and parent knows, the mandatory nature of "should" depends on its interlocutor. "Private, you should shine your boots" from a sergeant; "Honey, you should take out the garbage" from a wife; and "Son, you should clean your room" from a parent leave no doubt as to their import.

However interesting and ambiguous this excursion into the meaning of "should" may be, it is not particularly relevant to our purposes, and we apologize to the reader if we have misled you. In the regulation we review, the word does not stand alone and, while the Government urges us to, we cannot divorce it from its phrasing context.

The regulation reads "... reappointment should not be denied unless...." Regulations, § 5.01(b). Employing a negative command, the Judicial Conference instructed that the court of appeals "should not" do something - should not deny an incumbent's reappointment, unless a condition

subsequent was fulfilled. The formulation of this section, therefore, was not simply a grant of authority, but an instruction to do a thing accompanied by a negative limitation. In explaining the impact of negative language on mandatory and directory regulations, Sutherland Statutory Construction, the treatise relied upon by Judge Newman in Exxon Chemical, explains:

> One of the strongest indications of what construction should be given a statutory provision may be found in the use of negative, prohibitory, or exclusionary words. Where statutory restrictions are couched in negative terms they are usually held to be mandatory.... Negative words in a grant of power should never be construed as directory. *Where an affirmative direction is followed by a negative or limiting provision, it becomes mandatory.*"

NORMAN J. SINGER, SUTHERLAND STAT. CONSTR., § 57.09 (5th ed. 1992) (emphasis added).

The appeals court's authority to reappoint is specifically limited in this regulation by the inclusion of a negative limitation and a condition subsequent. We believe that, read together, this language - "not be denied unless" - had the effect of converting what might otherwise be read as a directory suggestion - "should" standing alone - into a mandatory legal requirement.

C. Contextual Analysis

Just as we cannot read "should" as a stand-alone word, we also cannot divorce the analysis of the reappointment regulation from its administrative and statutory context [*648] and history. Indeed, as the Federal Circuit has stated, "statutory interpretation is a 'holistic endeavor' that requires consideration of a statutory scheme in its entirety." Vectra Fitness, Inc. v. TNWK Corp., 162 F.3d 1379, 1383 (Fed. Cir. 1999)(quoting United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371, 98 L. Ed. 2d 740, 108 S. Ct. 626 (1988)). We turn now in more detail to that statutory scheme, which involves a review of the constitution and reconstitution of the bankruptcy court system in the 1980s and 1990s.

The 1997 amendments to the JCUS reappointment regulations arose out of the 1996 Federal Courts Improvement Act. The existing statutory provisions for bankruptcy judges, however, predate that act. Congress created the current system in 1984, primarily as a reaction to the Supreme Court's decision in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 85-86, 73 L. Ed. 2d 598, 102 S. Ct. 2858 (1982), which held that the then-prevailing system of bankruptcy judges violated Article III of the U.S. Constitution. See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, codified in part at 28 U.S.C. §§ 151-158 ("1984 Act" or "Bankruptcy Act"). The Supreme Court found that bankruptcy judges had exercised certain powers which were reserved for Article III courts. It

emphasized that bankruptcy judges were not Article III judges because they did not enjoy life-time tenure. 458 U.S. at 61. While they were nominated by the President and subject to Senate confirmation, bankruptcy judges in the pre-1984 system served for only 14 years.

In its reconstruction of the bankruptcy court system, Congress specifically established bankruptcy courts as judicial bodies inferior to Article III courts. The judges would be known as "judicial officers of the District Courts" appointed for a 14-year term by the court of appeals of the judicial districts in which they are located. 28 U.S.C. § 152(a). As with the 1984 Bankruptcy Act, the FOIA of 1996 tasked the Judicial Conference with writing the regulations for the appointment process.

In both the 1984 Act, and the regulations that followed, Congress and the JCUS set up a merit selection process for new bankruptcy judges that stressed professional qualifications and personal character. This process is still in use for new judges. As the 1996 Senate Judiciary Committee Report accompanying the FCIA stated:

> The Bankruptcy Amendments and Federal Judgeship Act of 1984 articulated strict, specifically detailed ethical and scholastic standards for the selection of U.S. bankruptcy judges to ensure that such selections are governed by merit, character, and scholastic ability. This act also requires that the judicial council for each circuit, or a merit selection panel, if so convened by the council, to screen

> and review the qualifications of applicants, using strict criteria specified by both the Act and by accompanying regulations issued by the Judicial Conference of the United States. These procedures are thorough and time-consuming, both for the applicants and the reviewers.

S. REP. NO. 366., 104th Cong., 2nd Sess., 33 (1996).

Indeed, those are the minimum requirements. The JCUS regulations also required applicants to have at least five years of law practice experience or prior service as a judge or magistrate, undergo Federal Bureau of Investigation and Internal Revenue Service background investigations, as well as a complete disclosure of all financial holdings. To aid the courts of appeals in considering applications, Congress "delegated the screening function to Judicial Councils" and "Merit Selection Panels" that each Circuit could establish. Bason v. Judicial Council of the District of Columbia Circuit, 86 B.R. 744, 745 (D.D.C. 1988).

When the Supreme Court had invalidated the earlier system, it stayed the effect of its decision to allow Congress time to act. As part of its response to the Northern Pipeline decision, and in an effort to provide continuity, Congress provided a generous "sunset" provision for sitting bankruptcy judges. It extended their terms by 4 years from the date of the judge's last appointment, for a [*649] period not to exceed 26 months beyond the date of enactment. 1984 Act, § 106(a). Further, the 1984 Act included a provision - section 120(a)(2) - "encourag[ing]" the

courts of appeals to 'grandfather' sitting judges for appointment under the new statute. H.R. REP. NO. 798, 104th Cong., 2nd Sess., 22 (1996).

This section, no more than a policy preference, expressed "the sense of Congress that the courts of appeals should consider for appointment under [28 U.S.C. § 152], to the first vacancy which arises after the date of the enactment of this Act in the office of each bankruptcy judge, the bankruptcy judge who holds such office immediately before such vacancy arises." 1984 Act, § 120(a)(2). See also Bason, 86 B.R. at 748-51 (the D.C. District Court refused to grant a temporary injunction prohibiting the new appointee from taking the oath of office on the basis that Section 120(a)(2) did not grant the non-reappointed bankruptcy judge a protected property interest in reappointment).

In 1984, however, Congress did not provide for the reappointment of future incumbent judges, that is to say, judges initially appointed after 1984. As a result, if bankruptcy judges were to be considered for another term, they had to undergo the same selection process described above on equal terms with newcomers. This, of course, posed not only administrative and other hassles for the incumbent judge, but it also meant that his or her application would be judged in competition with other candidates. This system did not allow for even a presumption of reappointment, much less "squatter's rights." It was altogether possible that an incumbent judge could be rejected in favor of another candidate with more impressive credentials.

Consequently, 12 years later, with the FCIA of 1996, Congress amended the Bankruptcy Act to permit the courts of appeals to consider the reappointment of bankruptcy judges using procedures "that differ from the initial appointment of bankruptcy judges." S. REP. NO. 366 at 33. The amendment gave the Judicial Conference the authority to design streamlined reappointment procedures. We restate the provision for the reader's convenience:

> When filling vacancies, the court of appeals may consider reappointing incumbent bankruptcy judges under procedures prescribed by regulations issued by the Judicial Conference of the United States.

FCIA, § 303.

The Defendant argues that the "may consider" language is directory, and thus that the Third Circuit did not even have to consider Judge Scholl at all. Alternatively, it is perhaps also possible to interpret this language as saying that the Circuit Court shall consider Judge Scholl's application, but is free to follow or disregard the JCUS regulations. We find both interpretations persuasive of the linguistic dexterity of their author, but in no other way.

The language is identical to the 1984 Act's language for the appointment of a new judge. Just as Congress directed that the JCUS issue regulations for new appointments, so it now directed the JCUS to issue regulations for reappointments. See 1984 Act, § 120(b). Second, the Third Circuit actually followed

the JCUS reappointment regulations and, moreover, supplemented those regulations with several additional procedures. The Third Circuit did not choose to disregard the Judicial Conference regulations.

The Government has offered no documentary support or practical illustration that any Circuit Court has considered itself free to disregard applications for reappointment, or to consider those applications in disregard of the JCUS regulations. We understand this legislative text to mean nothing more profound than that the JCUS was authorized but not necessarily commanded to issue uniform regulations in this matter.

In any event, as noted, the Judicial Conference did in fact promulgate the regulations that stated that the incumbent "should not be denied" reappointment "unless" he or she "had failed to perform... according the high standards of performance regularly met by United States Bankruptcy Judges." Regulations, § 5.01(b). The JCUS also devised the process we outlined at the start.

[*650] This new system upended the, prior lengthy reapplication process that was necessary under the 1984 Act. Under the JCUS requirements, the incumbent judge was the only candidate considered - the position was never posted and no other applications would be accepted. In essence, the 1996 Amendment afforded the incumbent judge considerable practical advantages over potential

newcomer competitors. As the House Judiciary Committee Report on the FCIA stated:

> [FCIA Section 303] amends the [1984 Bankruptcy Act] to authorize the Judicial Conference to prescribe regulations which provide for the reappointment of incumbent bankruptcy judges that differ from the initial appointment of bankruptcy judges...
>
> [The first time rigorous application] procedures are unnecessary, however, in the case of applicants who are incumbent bankruptcy judges. The information regarding an incumbent's merit, scholarship, judicial temperament, etc., is no longer a matter which a judicial council or a merit screening panel need attempt to ascertain; they are facts, amply supported by a fourteen-year-old record. Thus, this section simply eliminates unnecessary expenditures of time and money...
>
> The failure to provide provisions concerning the reappointment of future incumbents (i.e., incumbents reappointed after the filling of first vacancies following the 1984 Act) with waiver of the fact-finding procedures appears to be an oversight [of the 1984 Act].

H.R. REP. NO. 798 at 22-23 (emphasis added).

Judge Scholl argues, quite persuasively, that this legislative change, coupled with the updated regulations issued by the JCUS, created a presumption that the incumbent judge had a firm

right to reappointment, subject only to the "unless" limitation. The Plaintiff also asserts that this scheme would parallel the "for cause" removal standards outlined in 28 U.S.C. § 152(e). A bankruptcy judge can only be removed by a majority vote of the court of appeals, and only for "incompetence, misconduct, neglect of duty, or physical or mental disability." Id. Whether or not that parallelism is literally or legally true, it is clear that the Judicial Conference placed the incumbent in so preferred a position that only by a demonstration that he or she had "failed to perform," could the reappointment be denied.

Finally, while we do not rest our conclusion on this point, we take some comfort in the fact that we are not alone in our reading of the Judicial Conference's regulations. The Administrative Office Bankruptcy Judges Division wrote and published a pamphlet for the courts of appeals, the judicial councils and the merit selection panels to help "guide" them in "their responsibilities in the bankruptcy judge selection process." THE SELECTION, APPOINTMENT, AND REAPPOINTMENT OF UNITED STATES BANKRUPTCY JUDGES at 1-2. The AO uses "unmistakably mandatory language" to describe the procedures for reappointment:

> It is presumed that reappointment of an incumbent will not be denied unless the incumbent has failed to perform the duties of a bankruptcy judge according to the high standards of performance expected of a United States bankruptcy judge.

> After the court of appeals considers the comments from the bar and public, it must reappoint the incumbent bankruptcy judge, unless an active judge of the court [requests a second vote].

Chapter 13 at 29 (emphasis added).

Even though the Director of the Administrative Office is under the supervision of the Judicial Conference, and the AO provides support to the JOUS, we take this only to be a contemporaneous staff understanding, not otherwise binding authority.

We do believe the AO had it right when it described Judge Scholl's reappointment as a "presumption." The history of the bankruptcy judge system, and the administrative context of the regulations at issue are completely consistent with our textual interpretation and support our holding that Judge Scholl had a firm right to be reappointed as a judge, absent the showing that he had failed to perform according to high standards.

[*651] **III. Coda**

We would be remiss if we did not complete the record by including a short discussion of the twice revised, post-1997 amended reappointment regulations.

The major concern of the JCUS Committee on the Administration of the Bankruptcy System in September 2000 appears to have been providing more time and procedural flexibility to the individual

courts of appeals. The Committee also added language to the regulations' preamble that states that they "set forth procedural guidelines that create no vested rights for any incumbent or prospective bankruptcy judges." Regulations, Preamble, as amended, Sept. 2000. However clear that language may be, the Committee did not remove the "reappointment should not be denied unless" language. It also did not change the other procedures (the initial vote, the public comment, and the possible second vote) that we discussed above.

Approximately six months later, in March 2001, the JCUS met and once again revised Section 5 of the reappointment regulations. According to the "Report of the Proceedings" from the March 14, 2001, meeting of the Judicial Conference, the JCUS made these additional changes to the reappointment chapter in order to:

> (a) clarify that court of appeals will consider an incumbent bankruptcy judge who seeks reappointment before considering other qualified candidates; [and]
>
> (b) remove a phrase from section 5.01(b) that might appear to create a presumption of reappointment.

JCUS Report of Proceedings at 8-9, Mar. 14, 2001 (emphasis added).

The phrase referred to in this note is, of course, the "should not be denied" language that

today we hold did, in fact, vest a firm right of reappointment in Judge Scholl.

These new amendments also eliminate the initial vote of the court of appeals and provide that if the incumbent judge is interested in reappointment, the Circuit Court will proceed directly to a period of public comment. The regulations further clarify that reappointment will only occur if a majority of the appeals court votes in favor of the incumbent, and that if the Court does not reappoint the incumbent, it will proceed to the JCUS procedures for new applicants.

Most important for our purposes, the amended regulations, as currently formulated, now state:

> The court of appeals shall decide whether or not to reappoint the incumbent judge before considering other potentially qualified candidates. In making this decision, the court of appeals shall take into consideration the professional and career status of the incumbent, and whether the incumbent has performed the duties of a bankruptcy judge according to the high standards of performance regularly met by United States bankruptcy judges and demonstrated those characteristics and qualifications specified in Sec. 1.01 and Sec. 1.02(b) of these regulations.

Regulations, § 5.01(b) Methods, as amended, Mar. 2001.

IV. Conclusion

Because Judge Scholl had a firm right to reappointment, he has stated a claim upon which relief may be granted. **We hereby DENY the Defendant's Rule 12(b)(4) motion.** In doing so, we have followed the Supreme Court's "rule that a complaint should not be dismissed . . . unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley, 355 U.S. at 45-46 (emphasis added).

The parties are hereby ORDERED to submit a Joint Status Report, outlining a schedule for further proceedings, no later than January 20, 2003.

IT IS SO ORDERED.

LAWRENCE M. BASKIR
Judge